EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Ms Z Wei		Canadian Imperial Bank of Commerce

Heard at: London Central

On: 11, 12, 13, 16, 17, 18, 19 and 20 May 2022 (and 27 May 2022 in chambers)

Before: Employment Judge H Stout
Tribunal Member Ms S Dengate
Tribunal Member Mr T Ashby

Representations
For the claimant: Marianne Tutin (counsel)
For the respondent: Rachel Crasnow QC (counsel)

LIABILITY JUDGMENT

The judgment of the Tribunal is that:

(1) The Respondent contravened ss 27 and 39(4)(c) of the Equality Act 2010 (EA 2010) by victimising the Claimant when it dismissed her with immediate effect on 20 March 2021 rather than with effect from 31 March 2021. This claim is upheld.
(2) The Respondent contravened ss 26 and 40 of the EA 2010 by harassing the Claimant for reasons related to sex when in November 2019 it called her a *"ladette"* and *"one of the boys"*. However, this claim is brought outside the time limit in s 123(1) of the EA 2010 and is dismissed.
(3) The Respondent did not contravene ss 13 and 39(2)(d) of the EA 2010 by directly discriminating against the Claimant because of her sex, race, nationality, nationality or ethnic origin. These claims are dismissed.

(4) The Respondent did not otherwise contravene ss 26 and 40 of the EA 2010 by harassing the Claimant for reasons related to sex, race, nationality, nationality or ethnic origin. These claims are dismissed.
(5) The Respondent did not otherwise contravene ss 27 and 39(4)(d) of the EA 2010 by victimising the Claimant. These claims are dismissed.

REASONS

1. Ms Wei (the Claimant) was employed by Canadian Imperial Bank of Commerce (the Respondent) from 16 April 2018 to 20 March 2020 when she was dismissed. The Respondent maintains the reason for dismissal was redundancy. This is disputed by the Claimant who contends that the Respondent has directly discriminated against her because of sex and/or race, nationality and/or ethnic or national origins contrary to ss 13 and 39 of the Equality Act 2010 (EA 2010), and victimised her contrary to ss 27 and 39 of the EA 2010.

The type of hearing

2. This has been an in-person hearing in open tribunal at London Central.

The issues

3. The issues to be determined as agreed by the parties are as follows:-

Direct discrimination

1. Did any of the following act(s) and/or omission(s) occur:
   (1) The Respondent subject the Claimant to belittling and degrading comments, particularly by Mr Wayne Lee:
      (a) On 13 July 2018, Mr Lee asked the Claimant at a lunch if she would babysit his daughter (§32.1 POC);
      (b) On 18 July 2018, Mr Lee asked the Claimant at work drinks again if she would babysit his daughter and mused that his marriage was suffering (§32.2 POC);
      (c) On 11 June 2019, Mr Lee wrongly accused and publicly reprimanded the Claimant for not providing information on time to the internal audit team without speaking to her first to understand the facts (§32.3 POC);
      (d) On 11 June 2019, Mr Lee acted in a very rude and dismissive manner towards the Claimant at an Inclusion and Diversity Council offsite (§32.4 POC);
      (e) On 20 January 2020, Mr Lee told the Claimant, at a meeting to discuss why she was hesitating to accept the Luxembourg offer, that she was like a “little sister” which was belittling (§32.5 POC).
   (2) When the Claimant raised concerns with Mr Paul Atkinson and Ms Cheryl Ford, the Respondent took no formal action to ensure that Mr Lee’s treatment of her

would not become the accepted way of treating her in the organisation (§34 POC).

(3) The Respondent subjected the Claimant to degrading and humiliating treatment at Ms Elaine Ducklin's leaving drinks, at which Mr Lee was dismissive towards the Claimant (§36.1 POC).

(4) The Respondent subjected the Claimant to a hostile environment at the Christmas party where she (and others) had to listen to inappropriate quotes including of a sexual nature made by employees during the year which were logged in a joke book by Mr Atkinson being read out and then voted on by employees present (§41.6 POC).

(5) Attitudes and stereotypical perceptions of the Claimant infected the process for appointing her to the combined roles of COO/CRO of the Luxembourg entity, by way of the following:

  (a) The Respondent criticised the Claimant for her relationships with her colleagues, by calling her a "ladette" and saying she was seen as "one of the boys" (§39 POC);

  (b) When the Claimant raised concerns with Mr Atkinson about the cost of living in Luxembourg, he told her that she could sell her house in London (less than two months before the proposed relocation) (§40 POC).

(6) The Respondent proposed a remuneration package to the Claimant in the combined roles of COO/CRO which was significantly less than that offered to Mr Thomas Pellequer. In particular, the Claimant's base salary was not increased, nor was she offered a role-based adjustment, thereby denying her the opportunity to earn the total discretionary compensation in the COO/CRO CSSF applications. She also did not receive an offer that included a discretionary bonus or relocation package (§§43-53 POC).

(7) The Respondent failed to provide the Claimant with any written offer of employment for the combined roles of COO/CRO, despite her full regulatory registration with the CSSF for those roles and being exposed to the associated risks and liabilities for nearly a year (§54 POC).

(8) The Respondent replaced the Claimant in the combined roles of COO/CRO with Mr Nik Legge (§55 POC).

(9) The Respondent decided to make the Claimant redundant without:

  (a) Allowing her time to reconsider the proposal, claiming that she had "burned her bridges" by turning down the offer (§23 POC);

  (b) Attempting to negotiate a new package for her proposed role in Luxembourg despite her full registration status with CSSF (§62.1 POC); and

  (c) Finding her an alternative position in London or elsewhere, having transferred and distributed her previous role to other employees (§62.2 POC).

2. If so, did the Respondent, by any of the conduct alleged above, treat the Claimant less favourably than it treated Mr Pellequer or Mr Legge, or would have treated a hypothetical male employee and/or non-Mandarin speaking Chinese employee in materially similar circumstances? Mr Pellequer is relied upon as a comparator in respect of the detriment(s) set out at paragraph 2(6), (7) and (9); Mr Legge is relied upon as a comparator in respect of the detriment set out at paragraph 2(8).

3. If so, was any less favourable treatment because of sex and/or race, nationality and/or ethnic or national origins?

<u>Harassment</u>

4. Was the Claimant subject to any unwanted conduct? The Claimant relies upon the act(s) and/or omission(s) set out at paragraphs 1(1)-(5) above.

5. If so, was any of the unwanted conduct alleged above related to sex and/or race, nationality and/or ethnic or national origins?

6. If so, did any of the unwanted conduct have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her? In deciding whether any of the unwanted conduct had the proscribed effect, the Tribunal must consider:
   (1) The Claimant's perception;
   (2) The other circumstances of the case; and
   (3) Whether it is reasonable for the conduct to have that effect.

Victimisation

7. Did the Claimant do a protected act, including by way of the following:
   (1) Raising concerns about Mr Lee's behaviour towards her on or around 9 November 2018 with Mr Atkinson ~~and on or around 19 June 2019 with Ms Ford~~ (§34 POC);
   (2) Raising concerns that her proposed salary for the combined roles of COO/CRO was unfair and unequal with ~~Ms Ford on 19 June 2019 (§12 POC)~~, Mr Atkinson in November 2019 (§15 POC), ~~and Keith White in January 2020~~ (§§16, 20-21 POC); and
   (3) The correspondence of her representatives on 10 March 2020 (§27 POC).

8. Did the Respondent subject the Claimant to any detrimental treatment? The Claimant relies upon the act(s) and/or omission(s) set out at paragraphs 2(1)(c)-(e) and 2(2)-(9), and the following:
   (1) Bringing forward her dismissal from 31 March 2020 to 20 March 2020 (§27 POC).

9. If so, did the Respondent subject the Claimant to the treatment alleged above because the Claimant had done a protected act, or the Respondent believed she had done, or may do, a protected act?

Limitation

10. Did any act(s) and/or omission(s) of direct discrimination, harassment and/or victimisation relied upon by the Claimant occur more than three months before the presentation of her claim to the Tribunal on 19 June 2020 (subject to Acas Early Conciliation)?

11. If so, did any such act(s) and/or omission(s) form part of conduct extending over a period for the purposes of s.123(3) EqA, and was the claim brought within three months of the end of that period (subject to Acas Early Conciliation)?

12. If not, would it be just and equitable to extend time for any reason?

Remedy

13. What financial loss, injury to feelings and/or personal injury has the Claimant suffered as a result of the matters set out in her Particulars of Claim? Is the Claimant entitled to aggravated damages?

14. Has the Claimant mitigated her loss?

The Evidence and Hearing

4. We explained to the parties at the outset that we would only read the pages in the bundle which were referred to in the parties' statements and skeleton

arguments and to which we were referred in the course of the hearing. We did so. We also admitted into evidence certain additional documents.

5. We received written witness statements and heard oral evidence for the Claimant as follows:-

    a. The Claimant herself;
    b. Conny Man (Director of Financial Crime Compliance and Deputy Money Laundering Reporting Officer at the Respondent from 2018 to August 2020).

6. We received written witness statements and heard oral evidence for the Respondent as follows:-
    a. Keith White (Chief Risk Officer for Europe and Asia Pacific for the Respondent);
    b. Paul Atkinson (Chief Administrative Officer for the Respondent);
    c. Wayne Lee (Managing Director and Head of Europe and the Asia Pacific Region for the Respondent);
    d. Sarah Thomson (Business Manager for the Respondent);
    e. Marc Phillis (Executive Director, Head of UK Business Management for the Respondent);
    f. Gillian Miles (Senior Human Resources Business Partner for the Respondent);
    g. Cheryl Ford (Respondent's Head of HR for Europe and Asia).

7. We explained our reasons for various case management decisions carefully as we went along.

The Respondent's disclosure

8. The Claimant has complained that the Respondent has failed to disclose certain documents, but the only specific disclosure application that was made was in relation to the whole of the quote book (as to which, see below), and we refused that for reasons we gave at the hearing. The Claimant's other concerns about disclosure were, in our judgment, minor. No specific application was made for the Deloitte advice or the P20 list. Had it been, we might have granted it, but we did not consider of our own motion that these documents were necessary to the fair determination of the claim and we understand therefore why they were considered unnecessary by the Respondent. There is no inference to be drawn from their non-production. Ms Ford's practice of not using employee names in e-mails was not specific to this case and even if there might have been some late disclosure as a result (because such e-mails are less easily retrieved in electronic searches), there were no obvious gaps in the chronology or correspondence that indicated that other documents had been missed. The late production of the Respondent's UK Anti-Discrimination and Anti-Harassment Policy was unimpressive given the nature of this case, and it clearly should have been disclosed earlier, but we consider that the late production is attributable to

oversight in the preparation of this case by the Respondent's legal team, and provides no basis for adverse inferences in relation to the factual matters we have been required to consider. We draw no adverse inferences in relation to the Respondent's disclosure.

The facts

9. We have considered all the oral evidence and the documentary evidence in the bundle to which we were referred. The facts that we have found to be material to our conclusions are as follows. If we do not mention a particular fact in this judgment, it does not mean we have not taken it into account. All our findings of fact are made on the balance of probabilities.

Background

10. The Claimant was employed by the Respondent from 16 April 2018 to 20 March 2020 with the job title of Executive Director in the Strategic Planning and Business Management.

11. The Respondent is a Canadian multinational bank and financial services company headquartered in Toronto, Canada, but with a branch in London. It is not incorporated. It is a bank created by charter under the Bank Act (Canada), acting through its registered branch in the United Kingdom, which is registered on Companies House and the FCA register.

12. The Claimant's line manager was Paul Atkinson (Chief Administrative Officer, Europe). He in turn reported to Wayne Lee (Managing Director and Head of Europe and the Asia Pacific Region). Cheryl Ford is Head of HR for Europe and Asia.

13. As part of its strategic response to Brexit the Respondent from 2017 planned to open a new office in Luxembourg to enable it to continue trading freely in Europe post Brexit. This claim centres around the combined role of Chief Operating Officer (COO)/Chief Risk Officer (CRO) of the Luxembourg office, which was ear-marked for the Claimant, but (in the circumstances set out in this judgment below) the Claimant did not accept the salary that the Respondent proposed for the role. The Respondent then engaged someone else to do the role and dismissed the Claimant by (it maintains) reason of redundancy.

The Claimant and her role at the Respondent

14. The Claimant was born in mainland China and speaks Mandarin Chinese and English. She grew up and was educated in the United States and has both US and UK Citizenship. She is ethnically Chinese and speaks with an American accent.

15. The Claimant has degrees from Princeton and Stanford. The Claimant's previous professional experience includes working for Goldman Sachs, Accenture and UBS, and eight years at Credit Suisse where she held roles in Risk Management for Prime Services. Since leaving the Respondent the Claimant has obtained new employment and is currently working as the CRO of a US hedge fund.

16. The Claimant was first employed as an Executive Director in the Strategic Planning & Business Management department. When taking up the offer from the Respondent in the first place, the possibility of a role in Luxembourg was discussed and this was part of what interested the Claimant in joining the Respondent.

17. At the start of employment the Claimant was employed to do both front office controls work and also business development. This was not what the Claimant was expecting, but she agreed to it. The business development element was not included in any written agreement, but was a verbal understanding reached with Mr Atkinson. The front office controls aspect of her role was to start as about 80% of her role, and business development as about 20%, with that balance gradually shifting as it was intended that the front office controls work should be handed over.

18. The Claimant's starting salary was £175,000 with a "bonus opportunity" of £105,000. £175,000 was her base salary in her previous role prior to joining the Respondent. The Claimant was clear that she would not have accepted the role if the rate of pay was any lower than that. The role was ranked as a Level 9 (L9) role on the Respondent's job grading system, but the Claimant's base rate of pay was higher than that of any other L9 in the London Infrastructure department and also higher than all the L10s (2575-2576). So far as the Respondent was concerned, the higher rate of pay for the Claimant was explained by her previous salary and justified by the fact that she was to undertake the business development work. The front office controls aspect of the role was normally a lower paid role at the Respondent (Mr Atkinson suggests it would have been paid a salary of c£125k). The business development addition to the role was a 'true' front office role, and thus attracted a higher salary.

19. The Claimant ultimately received a bonus of £50,000 for her first six months in 2018. In 2019 she was awarded a bonus of £72,250 for the whole year, so that her total discretionary compensation (TDC) for 2019 was £247,250.

20. The Claimant's desk was in a corner of the trading floor, opposite to Marc Phillis (Executive Director, Head of UK Business Management) and next to Sarah Thomson (Business Manager), with Mr Atkinson nearby.

21. Conny Man joined the Respondent in 2018 as a Director for Financial Crime Compliance and Deputy Money Laundering Reporting Officer, and left in August 2020 because she was offered a role elsewhere. She regarded the Claimant as impressive, competent and knowledgeable and as *"one of the*

go-to problem solvers within the Bank given her breadth of experience and knowledge".

22. The Claimant was generally highly regarded at the start of her employment. In an email of January 2019 when she was first proposed for a role in the Luxembourg office, Ms Ford (Head of HR Europe) wrote to her line manager *"A high potential who is well regarded by [Mr Lee], [Mr Atkinson] and [Mr Dobbins]"* (186) (Mr Dobbins being a non-executive director of the Respondent based in Luxembourg).

23. The Claimant did not make any formal complaints during the course of her employment, but from Mr Lee's arrival in July 2018, and in particular after the incident on 9 November 2018 which we deal with below, she became concerned about the way that she was being treated by the Respondent, and decided to start taking notes as a way of protecting herself should things go more seriously awry as, indeed, from her perspective, they did.

The Respondent's equality and diversity policies and training

24. Compliance with the EA 2010 is, in broad terms, also part of the regulatory requirements imposed on financial services firms and regulated individuals in the financial services sector through the regulatory frameworks for which the Financial Conduct Authority (FCA) and Prudential Regulation Authority (PRA) are responsible.

25. The Respondent has a Respect in the Workplace: Anti-Discrimination and Anti-Harassment Policy (UK), which, according to its title page, has been in place since at least 2014, but which was not in the bundle until it was produced by the Respondent on Day 4 of the hearing. This version was reviewed in 2017. It was reviewed again in 2020 after the Claimant left.

26. The Respondent has an Inclusion and Diversity Council which reports to the Executive Management Committee. Mr Lee is Head of the Diversity and Inclusion Council for the Respondent. One inclusion event on which Mr Lee lead, was a Power of Inclusion event on 16 July 2019 (2728) which took place at the Old Bailey.

27. All employees are required to undertake training annually. This is necessary before the firm will certify the employee as 'fit and proper' for the purposes of the FCA regime. The Act with Integrity training module focuses principally on the FCA concept of integrity, and whistle-blowing, but does include reference to the Respondent's Code of Conduct, which in turn refers to the Respondent's Respect in the Workplace policy. Canadian employees, including Mr Lee, have undertaken specific Respect in the Workplace training, by reference to the Respondent's Canadian version of the Respect in the Workplace policy. There is no such specific training for the Respondent's London employees.

28. Most employees, including the Claimant, Mr Atkinson, Mr Lee and Mr White have completed the Respondent's Sexual Harassment Awareness training (2283). Other training modules, such as Managing Challenging Conversations make reference to equality and diversity issues, but do not focus on it. Mr White had in 2016 undertaken a 2-day course run by Men Advocating Real Change (MARC), which advanced the case for a diverse workforce in terms not only of the importance of equality, but also in financial terms in that diversity can drive better results. Mr Atkinson in May 2018 (2631) did Disrupting Unconscious Bias training.

29. Ms Ford said that there had also been training from Mayer Brown on Respect in the Workplace in the UK in 2018. She could not be certain which employees had attended this as it was not on employees' training records. We accept Ms Ford's evidence about this, but as there is no evidence that any of the employees involved in this case participated in that training, it does not advance this case.

30. The Claimant invites us to conclude that there was insufficient equal opportunities training in the Respondent's London office. We agree. With the exception of the MARC course that Mr White undertook in 2016, the training that employees could remember doing, and which is recorded in their records, was online training of a relatively superficial kind. The Sexual Harassment Awareness training goes a bit deeper, but it is only about sexual harassment and not about other forms discrimination. It is also concerning that it took the Respondent so long to produce its equal opportunities policy for a case concerning discrimination, and that so much emphasis was placed on the Act With Integrity training module which only required employees to tick that they had read the Code of Conduct and its appendices, one of which was the Respect in the Workplace policy. That does not demonstrate that real importance was placed on promoting and training employees on the Respect in the Workplace policy in the London office. We have taken all these matters into account in reaching our conclusions in this case, but in the event did not find that they provided us with much assistance in determining what actually happened as a matter of fact in this case.

<u>Alleged evidence of discriminatory policy / attitudes at the Respondent</u>

31. The Claimant has made a number of allegations about inappropriate conduct at the Respondent. Some allegations are dealt with in the course of the chronological account below. Others, we deal with separately in this section. We do not deal with every allegation, only with those where there is sufficient weight to the evidence we have heard (i.e. it is not merely hearsay or gossip about or by people who have not given evidence to us).

32. The Claimant suggests in her witness statement that the Respondent's London office has a culture of degrading women, that it is a *"male-dominated culture"* with very few female senior managers and that Cheryl Ford was the only 'obvious' senior woman. However, the Claimant and Ms Man accepted in oral evidence that the Head of Legal and the Head of Compliance were

also female, so there were other obvious senior women. Mr Atkinson's team consisted of nine females and three males. Mr White's team consisted of two females and eight males. So far as Mr Atkinson's team is concerned, therefore, it is not 'male-dominated'. Mr White was not cross-examined as to the reasons for the apparent under-representation of females in his team and so we draw no inferences or conclusions from the bare statistics.

33. Mr Atkinson had for about a decade run a 'quote book' with his team (822-840) in which amusing comments made by team members, the vast majority of which were sexually suggestive comments, were recorded and then voted on at the Christmas party each year, with a trophy going to the comment regarded as most amusing. Mr Atkinson saw the quote book as fostering a convivial atmosphere among team members. Most of the comments recorded were made by women, but this is to be expected given that the majority of Mr Atkinson's team were female. The Respondent's witnesses (including Mr Atkinson) accepted in cross-examination that the comments were capable of being particularly demeaning of women and (if not consented to) amounted in principle to sexual harassment under the Respondent's policy. Mr Atkinson felt that it was not harassment because everyone was happy to participate, but accepted it would have been harassment to have included someone who did not want to be included. It was not just Mr Atkinson's team who participated in the quote book, other individuals, including two senior individuals, one of whom was the (female) Head of Legal participated too. Mr Lee, Mr White and Ms Ford were all unaware of the quote book until the Claimant in advance of commencing these proceedings requested that it be preserved as evidence, although it was accepted that Mr Lee's predecessor had been aware of it. Mr Lee, Mr White and Ms Ford all said that if they had known about it they would have stopped it, that it could amount to sexual harassment of women, and Ms Ford accepted that it could foster a culture of making sexually suggestive comments about women.

34. Until the Claimant's claim in these proceedings no one had ever made a formal complaint about the quote book. Confidential employee surveys have indicated that Mr Atkinson's team has consistently received favourable scores on *"it is safe to speak up at CIBC"* and *"I would recommend CIBC as a good place to work"* (498).

35. The Claimant says she contributed to the quote book as she felt she needed to in order to 'fit in' and because she had been told not to mention it to anyone else (thus suggesting that participating in the book was a question of team loyalty). She also said that what happened to Ms Thomson when she complained made her (the Claimant) feel that she needed to participate. However, Ms Thomson gave evidence that the Claimant did not appear to be at all reticent about participating in the quote book. The Claimant also accepted in cross-examination that no one observing her would have known she had any concerns about the quote book. Ms Thomson did not particularly enjoy the quote book and felt that too many quotes by her were being included in it, particularly by the Claimant. She complained about it and asked the Claimant and the rest of the team to stop, but the Claimant and other team members continued to put lots of quotes in from her. Ms Thomson felt

that if the Claimant had had concerns about the book, she could have reduced her contributions to it quite easily. Ms Thomson even used the word 'bullied' to describe her feelings about what was happening with the quote book, and spoke to her line manager Mr Phillis about it, but he did nothing about it as Ms Thomson when he spoke to her said that she did not really feel 'bullied'.

36. The Claimant's perspective on what happened with Ms Thomson is different: she says that all team members were putting lots of comments about Ms Thomson in the book (just as many as she did) and that they nicknamed Ms Thomson 'Fluff' to show their dislike of Ms Thomson's attitude to the book. Ms Thomson and Mr Atkinson disagree with the Claimant on this, saying that 'Fluff' was a nickname Mr Atkinson gave Ms Thomson years ago and was nothing to do with the quote book. Ms Thomson also said that she did not feel pressured or shunned for not joining in with the quote book, she just did not like that so many quotes by her were put in the quote book.

37. The book is no longer used. It stopped with lockdown when everyone started working from home and will not be restarted because all the Respondents' witnesses agreed this case has made it clear that it is inappropriate or, as Mr Atkinson views it, that the intention of the book can be misconstrued.

38. Drawing the above evidence about the quote book together, we find that the Claimant was a willing and active participant in the quote book and that her claim now that it made her feel uncomfortable and she was doing it only to 'fit in' with the team is a retrospective version of events that does not reflect reality at the time. We observe that none of her personal notes to herself about matters that upset her or made her feel uncomfortable relate to the quote book. If she really felt uncomfortable about it, she need not have participated to the extent she did. We do not accept that what happened with Ms Thomson deterred the Claimant from making a complaint; on the contrary, Ms Thomson's raising of an objection gave her the opportunity for an ally if she really wanted the book to stop. We find that at the time she saw the quote book as it was intended by Mr Atkinson, i.e. as light-hearted fun. However, we nonetheless consider that the quote book, and the celebration of it every year at the Christmas party, fostered a culture in which the making of sexually suggestive comments about women was regarded as normal and acceptable. As the Respondent's witnesses now accept, if 'unwanted' the comments in the quote book amount to unlawful sexual harassment. It was concerning to hear that when Ms Thomson objected to so many comments by her being included the book that no action was taken in relation to that, but this is the Claimant's claim not Ms Thomson's and we find that the quote book was not, at the time, 'unwanted' so far as the Claimant was concerned.

39. Another allegation made by the Claimant and Ms Man is that they heard that Mr White had made remarks about his secretary Ms Martin's breasts at the Risk Department Christmas lunch. Ms Man said she heard this from Ms Martin herself, the Claimant said she heard it from another employee present at the lunch. Mr White denies this, but does admit that at that Christmas lunch, in the course of a question-and-answer game, he drew a card which

required him to name who he thought was the person most likely to have a one-night stand. Mr White felt a degree of peer pressure to keep the game going and answer the question, so he did so by naming his Executive Assistant, who he was aware was single. In hindsight, he regretted the remark and accepted that he should not have answered the question but should have stopped the game. He also accepted that what he said was particularly offensive towards women and especially inappropriate given the power imbalance between him and his Executive Assistant. The Executive Assistant did not complain about it, including in her exit interview (966). We find, as Mr White accepted, that he made a remark about his Executive Assistant that was demeaning to her as a woman. We accept his evidence that he said nothing about the Executive Assistant's breasts as he is the only witness from whom we have heard who was present at the event in question. The evidence of the Claimant and Ms Man is 'hearsay' and we reject it.

40. The Claimant also alleged that in the summer of 2019 Mr Atkinson commented to the Claimant that she should not wear a figure-hugging dress to a meeting with Mr Lee the next day as Mr Lee *"needs to focus"* on what she has to say. She further says that there was a culture of commentary on what women were wearing and the supposedly sexual implications of their clothing choices. Mr Atkinson denies saying this and a majority of the Tribunal accepts his evidence on this. Notwithstanding his presiding over the quote book, and the joke that he made about her being 'decent' in a video call on 30 March 2020 (1216), the majority prefers Mr Atkinson's evidence to that of the Claimant on this issue. This is because (and on this the Tribunal is unanimous) the Tribunal found the Claimant in a number of respects to be an unreliable witness as there were a number of aspects of the Claimant's evidence that embellish or distort the truth. We have in mind in particular how she exaggerated her evidence about the quote book, about the proportion of females in her team, and her evidence about taking on regulatory responsibility for the COO/CRO role. The minority (the judge) finds that although the Claimant was in general the least reliable witness, on this point her evidence is to be preferred to Mr Atkinson and that Mr Atkinson did make a joke about the Claimant not wearing a figure-hugging dress by saying Mr Lee *"needs to focus"*. The minority considers that this sort of comment reflects Mr Atkinson's general sense of humour as demonstrated through the quote book and the joke he made in the video call on 30 March 2020 and therefore it is more likely than not that he did make the comment alleged by the Claimant.

41. On 30 March 2020 Mr Atkinson in a conversation with the Claimant about her impending redundancy jokingly said (1216) *"just make sure you're decent alright"* when suggesting that they might have a video call. The Claimant recorded this conversation and we have a transcript of it. When questioned about it, Mr Atkinson said it was 'light-hearted'.

42. The Claimant and Ms Man also gave evidence about Ms Alieva who thought she had been bullied and harassed during her time at the Respondent. However, Ms Alieva's line manager was a woman, and the Claimant and Ms Man accepted that Ms Alieva was not alleging discrimination. Ms Alieva's

resignation letter (1161) refers to a decision to resign *"because of the lack of guidance, support and the rude behavior from my boss and that I don't feel appreciated for my efforts"*. There is thus no evidence that Ms Alieva either was, or believed she was, discriminated against or harassed because of her sex.

43. All witnesses accepted that there was an incident some years ago involving an executive assistant who is still employed by the Respondent where her skirt blew up at a social gathering revealing that she was not wearing any underwear. The Claimant maintains that this anecdote was told in a team setting many times to her by Mr Atkinson and that it was derogatory, but she has had no direct contact with the individual about it. It is accepted by the Respondent that the story has been told many times, but Mr Atkinson said that the executive assistant in question herself considers it funny and that discussion of the incident is harmless fun. We find it understandable that an incident like this could become the subject of a running joke in the office. Given that it would be embarrassing for anyone regardless of sex to be seen without underwear in the office, there is nothing inherently discriminatory or sexist about such an incident becoming a running joke and in the absence of any evidence from the Claimant as to what was said about this incident that was derogatory, we do not accept that this incident provides evidence of a discriminatory culture.

44. Ms Man gave evidence that she saw *"elements of an old schoolboy environment where there was a lot of 'banter' in the office"* which was derogatory towards women and could be uncomfortable. She noted that comments would be made about the Claimant's 'sharp', figure-hugging dresses, although Ms Man considered that the Claimant was always professionally dressed. Ms Man's evidence about office 'banter' of this type was general and non-specific and while we do not reject it as it fits with the other evidence we have heard about the quote book, we place little weight on it.

45. Taking the above evidence about the alleged discriminatory policies / attitudes at the Respondent together with the evidence and our conclusions below regarding further specific incidents about which the Claimant has complained, we consider that there were elements of the Respondent's culture that were discriminatory towards and/or degrading of women, but that these elements were confined to 'office banter' or 'loose language' rather than being symptomatic of any general culture of less favourable treatment of women over matters of substance such as work opportunities, or of lack of respect in the workplace as regards professional matters and pay and grading.

<u>Mr Lee and his alleged attitude towards Asian women</u>

46. Mr Wayne Lee started working in the London office on 9 July 2018. He is a Hong Kong-born, ethnic Chinese man who speaks Cantonese. He was the Managing Director and Head of Europe and the Asia Pacific Region for the

Respondent. After moving to the UK he was the Head of the Diversity and Inclusion Council for the Respondent. Every member of the executive team in London reported to Mr Lee.

47. There were about thirty Chinese women in the London office. The Claimant was the only mainland Chinese woman in Mr Atkinson's team, but there were others in the workforce. There is no way of telling from how someone looks whether they are from Hong Kong or mainland China, but it may be possible to tell from accent. However, in the Claimant's case, as she speaks with an American accent, this is not possible. The Claimant and Mr Lee did have a conversation early on about speaking Mandarin. Mr Lee was uncertain when he first knew that the Claimant was mainland Chinese, he thought it might have been when she commenced this claim. During her time at work, he had not given it much thought, but he supposed he had assumed that the Claimant was American with mainland Chinese parents. This is plausible and we accept his evidence as reflecting his understanding at the time.

48. Mr Lee is married and has a daughter who was aged seven when he moved to the UK. In Hong Kong the family had live-in domestic help. In the UK they have domestic help, but not live-in. Mr Lee is not responsible for arranging babysitting for his daughter. His wife does that as the primary carer, but she is also a professional who works in her own right on a consultancy basis.

49. The Claimant believes that Mr Lee perceived the Claimant as inferior to himself and her Caucasian male colleagues. She says that it is well known in the Chinese community that Hong Kongese individuals look down on mainland Chinese individuals. In her witness statement she stated that she believes that he also has a stereotypical view that Chinese women should get married and stay at home, that this is what happened with his own wife, and that this view influenced his treatment of her (i.e. the Claimant).

50. Ms Man also perceived Mr Lee to be chauvinistic and dismissive of Chinese women. She perceived his attitudes to have their roots in 'traditional' Chinese attitudes to women, which include celebrating the birth of boys and valuing them more than girls, and regarding the place of women, particularly Chinese women, as being 'in the home'. She also asserted in evidence that Mr Lee's own wife had given up work when they married. Ms Man is from Hong Kong too. In oral evidence, Ms Man acknowledged about herself: *"I am preconditioned to understand what a Chinese man in a working environment believes and this is what I have grown up to in my family"*. She further accepted that her view of Mr Lee was based on this stereotypical view.

51. We note that the Claimant's views about Mr Lee, especially as set out at paragraphs 20-22 of her statement, are similarly based on stereotypes about Hong Kong Chinese men. Even when it was put to the Claimant that Mr Lee's wife is a professional and she was shown his wife's LinkedIn profile, the Claimant still asserted that the fact that Mr Lee's wife wanted to work did not mean that Mr Lee was happy with her working or did not hold the stereotyped views she ascribed to him.

52. Mr Lee considers that he 'championed' the Claimant while she was at the Respondent and that he does not 'look down' on individuals from mainland China. He said he left Hong Kong in 1989 (i.e. at the time of the Tiananmen Square protests and massacre), that Chinese political history is complicated, that there are tensions between Hong Kongese and mainland Chinese, but he does not subscribe to any particular view. Mr Lee also gave evidence of his commitment to diversity in the workplace, and explained, in relatively sophisticated terms, his understanding of the difference between *visibility* of women and minorities, and *opportunities* for minorities, and the importance of both for equality.

53. The Claimant and Mr Atkinson gave evidence about another employee, Ms Lok, who they said left the bank because she was not happy in her role and being line managed by Mr Lee. The Claimant alleges that Mr Atkinson told her this was because Ms Lok had complained about discrimination by Mr Lee, but Mr Atkinson denies that. His account is that Ms Lok had found Mr Lee very demanding as a line manager. However, in a WhatsApp message of 9 November 2018 in which the Claimant complained about Mr Lee speaking to her in a condescending manner, Mr Atkinson replied: *"He has a reputation with Asian women for this … better to let me deal with him"* (121), to which the Claimant replied *"Yeah I think that is the best way forward"*. Mr Atkinson said that he was basing this remark on what he knew of Mr Lee's interactions with Ms Lok. He said that he believed that Mr Lee also had a 'strong relationship' with another Chinese female in the Hong Kong office, Sharon Yo, but that working relationship was not problematic so far as Mr Atkinson was aware. Mr Lee says that Ms Lok did not leave because of him, and that they have remained in touch. He exhibited evidence of friendly WhatsApp messages between them. The parties agree that Ms Lok is from Hong Kong. The Claimant maintained in oral evidence that her belief that Mr Lee acted detrimentally towards Ms Lok (who is Hong Kongese) as well as herself (mainland Chinese) did not undermine her theory that Mr Lee thinks Hong Kongese are superior to mainland Chinese women.

54. The Claimant alleges that Mr Lee was dismissive to her at Elaine Ducklin's leaving drinks (the date of the event does not matter). Mr Lee says that at the drinks he was focusing on people with whom he did not interact regularly (such as Ms McBirney). The Claimant was speaking to Ms McBirney and Mr Lee joined them and spoke to Ms McBirney to the exclusion of the Claimant. The Claimant says that afterwards Ms McBirney told her that she noted how differently Mr Lee treated the Claimant. We have not heard evidence from Ms McBirney, who still works for the Respondent, but has not been called as a witness by either party. We accept Mr Lee's reasons for why he might have focused more on Ms McBirney than the Claimant at this party. We find that the Claimant was being overly sensitive in relation to this incident.

55. At the Christmas party in December 2019, Ms Man alleges that Mr Lee ignored her when walking along the trading floor to shake employees' hands at the Christmas party. However, she accepted that she did not see the whole of Mr Lee's walk and he said that there are over 250 staff in the London office and it was impossible for him to greet everyone. He says he did not miss her

out because of her sex or ethnicity. We accept that, given the large number of staff in the office and the nature of the occasion, sex and ethnicity were no part of his reasons for not shaking her hand.

56. Other incidents involving the Claimant and Mr Lee we deal with in the course of the chronology below. We add here only that the Claimant's relationship with Mr Lee was not wholly sour even by January 2020 as she accepted that on that date she had, of her own volition, sent Mr Lee details of sleep devices he might like to try (851). The Claimant also asked Mr Lee out to lunch on occasions although this was only if they had work-related things to talk about or at the request of Mr Atkinson. Regarding Mr Lee inviting her to lunch on 2 May 2019 (274) to discuss 'Aberdeen Standard' she said that she had been looking for a slot for a work meeting with Mr Lee, and did not want to go to lunch, notwithstanding that her email response to him at the time was positive.

57. In the light of the evidence we have received, we draw the following conclusions about Mr Lee's attitude towards Chinese women, including mainland Chinese women. We find, first, that there is nothing in the Claimant's allegation that Mr Lee looks down on mainland Chinese women because the Claimant's own case that he 'snubbed' Ms Man and 'mistreated' Ms Lok, both of whom were Hong Kong Chinese, undermines that allegation. The Claimant herself is the only example of a mainland Chinese woman being said to be 'looked down on' by Mr Lee, but the evidence of how Mr Lee treated the Claimant points in the opposite direction. Mr Lee put her forward for career development opportunities which we deal with in more detail below, but which include the Town Hall meeting, Power of Inclusion event, dinner with Mr Dodig, "future leaders" and the COO/CRO role itself. He put her forward when he could have chosen many other employees. He even stood up for her in November 2019 maintaining that she should stay in the COO/CRO role even when concerns about her were brought up by Ms Ford for consideration at the meeting on 30 November. These are not the actions of a person who 'looks down' on someone.

58. We further find that Mr Lee did not in general have a discriminatory attitude towards Chinese women. This is not borne out in his treatment of the Claimant, as already noted. Nor is it borne out by his treatment of Ms Lok. We have not heard evidence from Ms Lok, but as there is evidence that she has continued to have a friendly relationship with Mr Lee since leaving the Respondent, it is improbable that she perceived him as a discriminator. The evidence about his working relationship with Ms Yo that we heard was that he had a positive (albeit notably 'strong') relationship. If anything, the evidence we have heard suggests that Mr Lee may have taken a particular interest in the career development of the Chinese women with whom he worked, but that is not evidence of discrimination against Chinese women or of him having a stereotypical attitude towards them that their place should be 'in the home'. Mr Atkinson's perception of Mr Lee's approach to Asian women, as expressed in the WhatsApp message of 9 November 2018, was, we find, a throwaway comment principally intended to make the Claimant feel better about what had happened by 'depersonalising' it. Mr Atkinson's

comment was based on his perception of only one very small portion of the evidence that we have received in this case (i.e. what he understood to have happened with Ms Lok). While we give some weight to Mr Atkinson's view as expressed in the WhatsApp message because it is very unusual to have someone expressing that sort of view about another witness in a case, we find that when all the evidence is taken into account, Mr Lee does not have a generally discriminatory attitude towards Asian women.

July 2018 incidents

59. When Mr Lee joined the London office on 9 July 2018 he was keen to meet his team and tried to arrange lunch with people. The Claimant felt that he was particularly persistent in asking her and noted in a private note made four months later on 27 November 2018 (130) that she *"felt obligated to comply as he is the head of the region"*. She arranged lunch for 13 July 2018 and noted to herself that she invited Mr Phillis, Mr Chin and Ms Thomson to come along because she *'did not feel comfortable'* going to lunch with Mr Lee by herself. We observe from this note that the Claimant's poor impression of Mr Lee appears to have been formed almost immediately on his joining. In her witness statement, the Claimant said that this was because she had *"been made aware by Mr Atkinson from the beginning of [her] employment that Mr Lee had previously treated female staff in the Respondent's offices in Hong Kong condescendingly and disrespectfully"*, but this was not explored in evidence and we make no findings as to the reasons why the Claimant mistrusted Mr Lee from the start. We do, however, find as a fact that the Claimant did mistrust Mr Lee from the start, before she had had any personal contact with him at all and that her mistrust was therefore based on her preconceptions of him, and not on anything Mr Lee had done to her at that stage. Indeed, it is notable that from the outset Mr Lee was keen to meet with the Claimant for lunch, which is itself not consistent with the Claimant's allegation that he 'looked down' on her. Mr Lee's actions were misinterpreted by the Claimant from the outset.

60. On the way to lunch, Mr Lee and the Claimant chatted and he told her that he missed the domestic help his family had had in Hong Kong and asked the Claimant if she would babysit his daughter. The Claimant's own note confirms she took this as a joke at the time. Mr Lee cannot recall making the comment, but does not deny doing so, and as it appears from the evidence that the babysitting joke is one he has made on three occasions, we accept he made this comment. (The second occasion also involved the Claimant; the third was at Mr Autotte's retirement drinks where Mr Lee made a speech in which he joked that Mr Autotte, a Caucasian male employee, could now 'babysit' his daughter. This was the evidence of Ms Ford, which was not challenged by the Claimant and we accept.)

61. The Claimant told her colleagues after the lunch that Mr Lee had made this remark, including Ms Thomson and Mr Atkinson who both recall her mentioning it. Ms Thomson recalls the Claimant being annoyed about the comment, but she thought it must obviously be a joke. Mr Atkinson does not

recall the Claimant making a 'big deal' of it. Mr Atkinson mentioned the comment to Ms Ford some time later and they agreed that it was an *"unusual comment"*, but he thought that, if it was said, Mr Lee would have been joking.

62. After the lunch the Claimant emailed Mr Lee thanking him for a 'lovely lunch' (107) and offering to pay next time. The Claimant said this was 'just a formality' and she gave him suggestions about where to go in the UK because he had asked and she felt she had to given his seniority.

63. The Claimant alleges that at work drinks on 18 July 2018 Mr Lee asked her when she was going to babysit his daughter and mused that his marriage was suffering. Prior to him making these comments, the Claimant had told Mr Lee that her goddaughters were visiting. Mr Lee cannot remember making the comment about babysitting, but does not deny it. He thinks he might have made a joke about her babysitting his daughter given that he thought she had mentioned she was going to be babysitting her goddaughters. Mr Lee is adamant he would not have discussed his marriage as his marriage has never suffered and this was a work drinks with his new boss.

64. We find that Mr Lee made the 'babysitting' remarks alleged by the Claimant on both occasions, but he made them as a joke. That it was a joke, and one that he uses to both men and women, is clear both from his own evidence and from the fact that he made the the same joke about Mr Autotte. Any reasonable person would have perceived the remarks as jokes because it is so obviously inappropriate for a senior work colleague to ask a more junior colleague to babysit their children that any such remark could only reasonably have been intended as a joke. Indeed, even the Claimant with her mistrust of, and stereotyped views of, Mr Lee, perceived it as a joke on the first occasion. It was only when the joke was repeated that her (unjustified) mistrust of, and stereotyped views of, Mr Lee led her to think it was not a joke. Further, in the light of Mr Lee's evidence, which we have found generally to be more reliable than the Claimant's, we do not accept that he told the Claimant his marriage was suffering, but if he did say that, we consider that it would have been said in the same way and with the same intent as the babysitting comment, i.e. as a joke.

65. Later in July 2018, Mr Lee invited the Claimant to join a lunch with Christian Exshaw (Head of Global Markets, and a Member of CIBC's Operating Committee, based in Toronto). She was the only one invited from the CAO team. The Claimant does not recall this, but we accept Mr Lee's evidence.

<u>September 2018</u>

66. The Claimant alleges that on 7 September 2018 she had a conversation with Mr Atkinson during a trip to Belfast when Mr Atkinson said that he had known Mr Lee a long time and that there was a mutual dislike. The Claimant also says that it was well known in the office that Mr Atkinson and Mr Autotte had applied for the role that Mr Lee got and were unhappy about it. Mr Phillis agreed it was well known that Mr Atkinson had applied for the role and that

there had been tensions in his working relationship with Mr Lee, but he had seen them working through those issues constructively. The conversation that the Claimant alleges she had with Mr Atkinson was not put to Mr Atkinson and (given that we have not found the Claimant's evidence to be wholly reliable) we are not satisfied this conversation occurred as alleged, but we do find that there was some tension in the working relationship between Mr Atkinson and Mr Lee, in particular from Mr Atkinson's perspective. This is reflected to an extent in Mr Atkinson's remark about Mr Lee's attitude toward Asian women in the WhatsApp message of 9 November 2018.

67. In September 2018, when Victor Dodig (President and Chief Executive Officer, based in Toronto) visited the London office, Mr Lee included the Claimant in a list of 13 attendees from the London office to attend dinner with him (112). Mr Lee sent Mr Dodig an email in advance of the meeting, highlighting aspects of the Claimant's biography and the other attendees for Mr Dodig.

Preparations for the Luxembourg office

68. The Respondent's strategy in response to Brexit was to set up a Luxembourg office to ensure that it would continue to be able to trade freely in Europe post Brexit.

69. In order to operate a financial institution in Luxembourg it is necessary to be authorised by the Commission de Surveillance du Secteur Financier ("CSSF"), the Luxembourg equivalent of the FCA / PRA, and the European Central Bank (ECB). Before authorisation is given, the CSSF requires that certain key, regulated roles including Chief Executive Officer (CEO), Chief Operating Officer (COO) and Chief Regulation Officer (CRO) have individuals assigned to them who have been approved by the CSSF as appropriate.

70. The Respondent completed a 'pre-filing' application for the Luxembourg entity in June 2018. This was essentially a draft application in order to start a dialogue with CSSF as to what was required in order for authorisation to be granted. At that stage, the Respondent had not intended to have a separate CRO role in addition to the COO and explained its rationale for combining this role to the CSSF. An existing employee of the Respondent, Ms Wickes, was named for this role (1371), and there was no separate headcount for a COO role included (1506). Mr Atkinson was in the same document named as the CEO. Both were named as 'placeholders' with the Respondent having no real intention of either of them fulfilling the roles when it came to it. The proposed compensation levels were indicated in that document as E900k for the CEO and E330k for the combined CRO/COO role (1507). The staff budget was based on information received from Deloitte about the Luxembourg market. The information was needed because the CSSF required the pre-filing application to include a five-year financial plan for the new office.

November 2018 incidents

71. In November 2018 the Claimant and Mr Phillis were asked by Mr Lee at short notice to put together a financial plan for the Luxembourg office. The Claimant did not have experience of doing something like this and it was outside the scope of her then role. Mr Lee thought it was an opportunity for her to learn more about the business. Financial planning was part of Mr Phillis' normal role. There was a discussion in the morning of 9 November 2018 between Mr Lee, Mr Atkinson, Mr Autotte, Mr Phillis and the Claimant about the draft plan. The Claimant and Mr Phillis then worked on it. They sent their work to Mr Lee and he then came to speak to both of them at their desks. The Claimant alleges that he 'lost his temper' with them both. Mr Phillis perceived it as Mr Lee being 'frustrated' that the plan did not contain the level of detail that he wanted to see. He asked them both to work on it again, which they did, although for personal reasons Mr Phillis had to leave so it was the Claimant who took the plan to Mr Lee that evening and they had a further discussion which upset the Claimant. In this discussion, Mr Lee questioned her about the plan and was critical of her. In notes she made at the time (130) she recorded that he said, *"I did not ask you for the history, I know the history, you are here to listen, not to tell me what I already know"* and that it *"was the worst piece of work he had seen in a long time"*. Mr Lee denies losing his temper and says he viewed the exercise as a development opportunity for the Claimant and he was pushing her to test her knowledge. He acknowledged that he can appear to be brusque and does speak rapidly at times. He pointed out that shortly after this incident he recommended her for the Luxembourg role.

72. We accept Mr Lee's evidence that he viewed this work as a development opportunity for the Claimant as that is indeed what it was, given that it was a new activity for her outside the scope of her role. However, he also wanted the work completed and we find he was frustrated and disappointed with the work that both the Claimant and Mr Phillis had done. He made that clear to both of them in the 'public' office. He also made it clear to the Claimant privately when he saw her later (and we accept her note as broadly reflecting what he said), but, if Mr Phillis had still been in the office at that point, we are satisfied that Mr Lee would have said exactly the same things to him as well.

73. Following this incident the Claimant complained to Mr Atkinson by WhatsApp that Mr Lee had been condescending towards her and Mr Atkinson responded with the message already referred to above, that *"He has a reputation with Asian women for this … better to let me deal with him"* (121), to which the Claimant replied *"Yeah I think that is the best way forward"*. Mr Atkinson later said to both the Claimant and Mr Phillis that they should let him know if Mr Lee asked them directly for work, and he spoke to Mr Lee. In the light of what Mr Lee said to him, Mr Atkinson understood that Mr Lee had been unhappy with the work and that he was pushing the Claimant to perform in the same way that Mr Atkinson perceived he had done with Ms Lok.

74. Later in November 2018, the Claimant took Thursday and Friday off as annual leave during which she travelled to the US for Thanksgiving. She flew

back on the morning of Monday, 26 November 2018 and returned to work the same day. (The Respondent's holiday records for the Claimant are wrong regarding these dates.) Later that day, Mr Lee walked over to her bank of desks and remarked that he was looking for some snacks. Ms Thomson said that the Claimant had just returned from the US and brought back sweets. The Claimant alleges that Mr Lee turned to the Claimant in front of colleagues and said *"wow, no one noticed you were gone, that is how much your presence is valued here"*. She made a note of what he said that day. Ms Thomson who sat next to the Claimant does not recall the remark. Mr Lee does not recall saying this, but says that if he did say it, it would be a joke. Because the Claimant made a contemporaneous note, we find that the remark (or something like it) was made by Mr Lee, but we find that it was said in a way that made it obvious it was joke, so that it did not stand out to Ms Thomson. It is the sort of thing that someone might say if they had not realised someone had been away and were confident that their relationship with the other person was such that that sort of remark would be understood as a joke (which we find was the case with the Claimant and Mr Lee, so far as Mr Lee was concerned, even though it is now apparent that the Claimant did not feel likewise).

75. On 29 November 2018 the Claimant alleges that Mr Lee came over to Mr Phillis' desk as the Claimant was speaking to him and said *"you guys don't come talk to me anymore. You don't need to be afraid to speak to me directly"*. The Claimant made a note to herself by email about it the following day (132) and Mr Phillis confirms that the remark was made and he thought it odd. The Claimant says that on 30 November 2018 Mr Lee told her that he was aware that Mr Atkinson had told her not to speak to him but that Mr Atkinson 'would be going soon' (i.e. going home soon) so they could have a chat. Later, around 5pm, Mr Lee asked her for a drink, but she was already on her way out to have drinks with friends. The Claimant says that the remark by Mr Lee made her feel uncomfortable and that she did not like being asked out to drinks by Mr Lee. This allegation was not dealt with by Mr Lee in his witness statement and not put to him in cross-examination. Given the Claimant noted it shortly afterwards, we accept that it was said and observe that it is a further indication of the disparity in Mr Lee's and the Claimant's perspectives on their relationship.

<u>December 2018</u>

76. At the Christmas party on 5 December 2018 (134) the Claimant alleges that Mr Lee said to her in front of colleagues *"oh I told you a few things you didn't like so you don't come and talk to me anymore".* The Claimant says that she found this hurtful, but she did not note this at the time. This allegation was also not dealt with by Mr Lee in his witness statement and not put to him in cross-examination. Given our doubts about the reliability of the Claimant as a witness, we do not accept that this was said by Mr Lee.

Early-mid 2019 – Luxembourg plans

77. In January 2019 the Claimant was recommended by Mr Lee for the COO role in the new Luxembourg entity by email of 9 January 2019 (175). This suggestion was supported by Mr Atkinson and Ms Ford, although Mr Atkinson expressed a concern that the CSSF might not think her sufficiently experienced (179). The Claimant and Mr Atkinson were then the only named employees included in the official filing of the banking licence application to the CSSF on 14 January 2019 (1617). Mr Atkinson was named as CEO, and the Claimant was named as COO (only), but the text of the application referred (1629) to an intention to combine the COO and CRO roles. Mr Atkinson explained that this was because discussions were ongoing with the CSSF about what should happen with those roles. Inconsistently with the text of the application that indicated the roles would be combined, in the staffing budget section, the January 2019 application included the COO and CRO roles identified separately in the headcount with the CRO budgeted at E225k and the COO at E330k (2014). As with the pre-filing application, the costs included were based on advice from Deloitte. The budget for the project was approved by ExCo of Europe.

78. The Claimant in her witness statement stated that she regarded herself as having been *"formally registered as COO and CRO of the Luxembourg entity in March 2019"* and as having *"immediately"* undertaken a regulatory liability from the perspective of the CSSF (including *"significant and indeterminate liability that can be criminal, civil and regulatory in nature"*), such that if her responsibilities were not met, she exposed herself and the Luxembourg entity to financial and regulatory risks. However, it was not until 21 August 2019 that the CSSF and ECB granted the Respondent authorisation to take up the business of a credit institution in Luxembourg. Under the terms of the authorisation, this gave the Respondent 12 months actually to establish an institution in Luxembourg in accordance with the CSSF's guidelines. It was not until May 2020 that the Luxembourg office went 'live' as a credit institution and individuals were formally appointed to the authorised manager roles at a meeting of the Respondent's Board on 26 May 2020 (2687). Those minutes also record that the Luxembourg entity was first established as a company on 3 July 2019, that since that point it had been in the process of seeking regulatory approval from the CSSF and the ECB, and that regulatory approval had only recently been granted (still subject to minor issues).

79. The Claimant was unable to give an explanation as to why she considered that she might have regulatory responsibility for a credit institution which was not trading, was not even legally in existence, and to which she had not been appointed as authorised manager. In her witness statement she had referred to p 212 of the bundle as being a 'public announcement' by the CSSF of her appointment, but that document is her Luxembourg criminal records certificate (with a 'nil return'). It is a bilingual document in French and German (with no English translation), but the judge's grasp of those two languages was sufficient to enable her to read the document. We pointed the nature of the document out to the parties at the hearing so as to give the Claimant an opportunity to identify the document she had meant to refer to if it existed,

but no further document has been produced. We take it that the Claimant had simply misunderstood what this document is.

80. We find that, contrary to the Claimant's evidence, she was not at any point appointed as authorised manager and she had no regulatory responsibility for the Luxembourg office at any point during her employment. Moreover, we note that it is clear from words the Claimant herself wrote at the time that she did not during her employment hold the view or belief that she now sets out in her witness statement. We have in mind her email of 14 August 2019 (514), her 2019 appraisal and her notes of her meeting with Mr White on 16 January 2020 where she records herself as asking Mr White why her base salary would be kept the same *"when I <u>will</u> be taking on regulatory risk where <u>currently</u> I do not have any"* (our emphasis).

81. The Respondent's witnesses described the inclusion of the Claimant's name in the January 2019 application as a 'placeholder' and we find that was an accurate description of the position, albeit that in the Claimant's case (unlike with the inclusion of Mr Atkinson and Ms Wickes' names previously), it did represent a genuine intention by the Respondent that she should take up a role at the Luxembourg office.

82. By April 2019 (264) the Respondent had been informed that the CRO role was the only one that the CSSF would permit to be combined with the COO role. There was still discussion to be had within the Respondent as to whether this was a good idea. Mr Lee, Mr White and Mr Atkinson decided that the roles could be combined as the volume of deals in the Luxembourg office would be low, the office would be small (15-20 people) and would carry little risk as it would be doing 'back-to-back' trades with the London office. Combining the roles also meant that only one salary need be paid.

83. There was then discussion as to whether the Claimant would be the right person for both those roles. Mr White proposed the Claimant as suitable for both COO and CRO roles (312).

84. The final application to the CSSF was made in May 2019 (1778). On this, Mr Atkinson was still listed as CEO and the Claimant was listed as COO. The text of the document referred again to the COO and CRO roles being combined (1883), but again inconsistently counted the COO and CRO roles as two headcounts in the staffing budget, with the total compensation for COO listed as E330k and the total compensation for the CRO as E225k.

85. On 21 May 2019 Mr White had lunch with the Claimant during which the combined roles were discussed and she expressed interest, with a view to moving into the COO role if and when the roles separated. He reported this to Ms Ford, Mr Atkinson and Mr Lee (311), noting that she would need to be given 'exposure' to *"areas that she has not historically covered"*. Ms Ford was encouraging in emails at that time, noting that she was looking to 'set the Claimant up for success' (310). Discussion began in these emails as to which department's budget the role would sit in. Ms Ford proposed putting a term sheet together for the Claimant (an internal document on which the

Respondent records any intended employment offers to employees), but this did not happen at this point.

86. From June 2019 onwards the Claimant and Respondent (Mr Atkinson, Ms Ford and Mr White) worked together on a detailed development plan to prepare for the Luxembourg move. A development plan was also a requirement for approval by the CSSF. The purpose of the plan was to help her prepare for the aspects of the role where she did not have the necessary experience, which the Respondent regarded as the CRO side of the role as the Claimant did not have a corporate credit risk background, and also governance. The Claimant was fully involved in producing her own development plan (379 and 562), with a final version being produced on 15 July 2019 (431-439).

87. Thereafter, an external executive coach was arranged (Mr Lee proposing someone he thought would be suitable: 465). Ms Wei met regularly with her coach from 4 October 2019 until March 2020 when she was made redundant (439, 1273). Her coach noted that she had made 'good progress' with her goals. The Claimant also from autumn 2019 onwards began participating in governance committee meetings such as the Executive Steering Committee for Project Luxembourg and the Operating Committee (at Ms Ford's suggestion: 429, 463).

<u>June 2019 incidents</u>

88. On 5 June 2019 Mr Lee asked the Claimant to be the 'master of ceremonies' and moderator at his first 'Town Hall' event hosted in London where management 'connects and engages' with employees. It was held at the Central Criminal Courts at the Old Bailey. He could have chosen any one of 250 employees for the role, but selected the Claimant as he says he wanted to give her an opportunity to develop and achieve visibility in the workplace. They worked closely together on the event and Mr Lee thought she had done a fantastic job. The Claimant felt that Mr Lee selected her for 'tokenistic' reasons to make himself look good for choosing an ethnic minority female. We reject the Claimant's interpretation of Mr Lee's motivations. We find that these (and the other occasions we have mentioned when Mr Lee selected her for development and visibility opportunities) to have been genuinely favourable treatment of her because he was trying to support her career. His efforts to support the Claimant went a long way beyond the 'tokenistic'.

89. The Claimant alleges that on 12 June 2019 Mr Lee wrongly accused and publicly reprimanded her for not providing information on time to the internal audit team without speaking to her first to understand the facts (326). Her note of the incident records what Mr Lee said as, *"I heard you haven't been providing Audit with materials on time"*. The Claimant felt that he was wrongly questioning her professionalism as she considered she had been providing materials to audit on time. This happened at the Claimant's / Mr Phillis' desk, but it was on the trading floor and so the Claimant felt that everyone could hear. However, Mr Phillis did not recall it at all and could not recall anything

having the character of a public reprimand on this occasion. Mr Lee said he was going by what he was told by Jill Clark of the Internal Audit team. Later that day, after a meeting with Mr Lee, Ms Clark came over to Mr Phillis' desk and said that she hoped she did not 'land the Claimant in it'. She was very apologetic. Mr Phillis, having spoken briefly to Mr Atkinson who said not to worry about it, communicated Ms Clark's message to the Claimant by email (327). From this email and the Claimant's contemporaneous note to herself (326), it is clear that Mr Lee had on this occasion wrongly interpreted an ambiguous remark by Ms Clark about the state of the audit to indicate that the Claimant had not yet provided all the information requested. However, we find this to be a genuine misunderstanding by Mr Lee, not a result of any general view he had of the Claimant's abilities as he continued to support her after this point, and in our judgment the Claimant reacted over-sensitively to his observation, which was a passing public remark and not a reprimand. The Claimant complained to Mr Atkinson about Mr Lee's treatment of her on this occasion. He took action by speaking to Ms Clark's line manager, Mr Makgrygiannis, not Mr Lee. Mr Makgrygriannis then spoke to the Claimant to apologise, thank her for work and he said regarding Mr Lee that this was *"just the way he was"*.

90. Also on 12 June 2019 the Claimant alleges that Mr Lee acted in a very rude and dismissive manner toward her at an Inclusion and Diversity Council offsite meeting. The Claimant made a point about looking at inclusion from different perspectives and she says that Mr Lee disagreed. The Claimant complains that this was a public contradiction and a snide comment and that he only came round to her point of view when it was picked up by others such as Ms Desai. It was suggested to her in cross-examination that it was just a different view point being expressed at a meeting, but the Claimant maintained her view that she had been slighted by Mr Lee on this occasion. Later the Claimant also spoke to Ms Shauneen McBirney, who she says observed that Mr Lee 'had got it in for her', but Ms McBirney has not been called to give evidence as to this remark. Mr Lee disagreed that he would have been dismissive. He considers that it is important at meetings that everyone is able to contribute their views. The Claimant has never given details of what was actually said at the meeting. The evidence that the Claimant has brought on this issue is not sufficient in our judgment to prove that anything untoward happened at the meeting on 12 June 2019. We find that whatever happened was not out of the ordinary, or indicative of Mr Lee having a dismissive attitude to the Claimant. This is another example of the Claimant being over-sensitive.

91. Around this time, the Claimant spoke to Mr Atkinson complaining that Mr Lee was being unduly critical of her. Mr Atkinson suggested that she should speak to Ms Ford. Mr Atkinson then spoke to Mr Lee and asked him in future to 'come through him' when dealing with the Claimant. Mr Lee was unaware there was a problem. He thought he was pushing the Claimant to be better as he held her to a high standard. Mr Atkinson saw Mr Lee's conduct in going direct to the Claimant with issues to be the way he normally dealt with individuals. In one of Mr Atkinson's regular meetings with Ms Ford around this time he raised with her the issues the Claimant had raised with him and

also the comment Mr Lee was alleged to have used to the Claimant the year before about babysitting and Ms Ford agreed to speak to the Claimant.

92. At the end of June 2019 Mr Lee and the Claimant attended a conference in Luxembourg and the Claimant introduced her best friend in Luxembourg to Mr Lee.

12 July 2019 Claimant lunch with Cheryl Ford

93. On 19 June 2019 the Claimant sent Ms Ford a calendar invitation for lunch on 12 July 2019 (416). This was at Mr Atkinson's suggestion. It was the first substantial interaction that Ms Ford and the Claimant had. On the way to lunch, the Claimant told Ms Ford that she had a late night at a drinks event with the global markets team the night before and was feeling 'jaded'. She said that Mr Autotte had left early and asked her to pay the bill and expense it, knowing that she would be one of the last to leave. The Claimant was raising this because she thought that Mr Autotte should have paid the bill. Ms Ford thought that this story did not reflect well on the Claimant and thought it was surprising she would tell her as Head of HR this story on their first proper meeting. It was a story that led Ms Ford to offer advice to the Claimant over lunch, and to make observations to Mr Atkinson subsequently, to the effect that the Claimant needed to 'elevate herself' and cultivate an 'executive presence' if she was moving into a management role. Ms Ford said that she would have had the same reaction if a man had told her what the Claimant told her at their first meeting. They did not at this lunch discuss the babysitting comments. Ms Ford in oral evidence acknowledged that, in the light of the way things had developed (which we understood to be a reference to these proceedings), she wished she had asked the Claimant more about those comments, but at the time she did not think to.

94. Over lunch the Claimant raised concerns about Mr Lee, but there is a dispute between her and Ms Ford as to what she said. Ms Ford recalls the Claimant saying that she was having difficulty working with Mr Lee and she gave her some advice about his body language and working style. She told the Claimant that she thought that Mr Lee thought highly of her (giving the example of her being asked to be the MC at the Town Hall event). Regarding a concern about a specific piece of work that the Claimant had raised, Ms Ford asked her if she had spoken to Mr Lee about it and suggested that they have lunch. The Claimant says that she informed Ms Ford that Mr Lee had asked her to babysit his daughter twice, that this made her feel belittled as a senior woman, and that she did not know how to deal with Mr Lee's unexplained aggressive behaviours, to which the Claimant says that Ms Ford responded *"oh, you know what he's like…"*. In oral evidence, the Claimant said that she could not remember raising any complaint about sex or race discrimination at this meeting. After this, the conversation over lunch was mostly about the development plan which the Claimant brought with her and plans for Luxembourg.

95. Regarding what happened at this lunch, we prefer Ms Ford's version of events. We find that the Claimant has elaborated on what was in fact a relatively general discussion, as is apparent from the fact that in oral evidence she accepted that she had not raised any specific complaint of sex discrimination, contrary to the impression that is given by her witness statement.

96. After the lunch, the Claimant emailed Ms Ford to thank her for her support (417). Ms Ford reviewed the Claimant's development plan after the meeting and sent her a few comments on it (427). This included reference to the Claimant possibly developing 'executive presence, influence skills' with her coach. In oral evidence, Ms Ford explained that this was partly because of what the Claimant had said about late-night drinks, but also because the role that she was being considered for was not a role with any direct line management responsibility, and she was going to need to know how to influence people without having any line management power over them. Ms Ford says she would have said the same thing about a man in the same circumstances, and we accept that she would have done. This is because we have found her to be a generally reliable witness, because we have not found any other evidence that would lead us to draw an adverse inference against her in this respect and because she gave unchallenged evidence that she has also coached a male senior manager, Mr Sweeting, in a similar way about how to change people's perception of him. This happened when he was concerned that Mr Lee had not asked him to be on the panel of the CIBC Town Hall on 5 June 2019 (when the Claimant was asked).

97. On the same day as the lunch, Ms Ford asked for costings for moving the Claimant to Luxembourg on a permanent basis from 1 March 2020, noting that she would be retaining her property in the UK which she intended to use on her trips home and that her 'significant other' would not be moving to Luxembourg (460-461).

98. The Claimant emailed Mr Lee on 18 July 2019 to arrange lunch with him to discuss her development plan as suggested by Ms Ford (440). Ms Ford checked in with the Claimant afterwards to see how she had got on with Mr Lee and the Claimant said the conversation had been so good that she had not needed to raise anything with him. In oral evidence, Ms Ford added that she felt that the Claimant was quite dismissive of her enquiry.

99. Later in November 2019 the Claimant says she was told by Mr Atkinson that Ms Ford had referred to her as a *"ladette"* and *"one of the boys"*. Mr Atkinson does not recall using the term *"ladette"* but he does recall Ms Ford may have used the term *"one of the boys"* and that he relayed that to the Claimant. Ms Ford denies ever using the word *"ladette",* but says she may have used the term *"one of the guys"* or *"one of the lads".* The word 'guys' is a word she uses for both men and women. The Claimant was sure the word *"ladette"* had been used as she had to look up what it meant and found that the word *"ladette" "describes a woman who is crude, boisterous and drinks too much"*. She said it was *"devastating"* to be called something like that. The Claimant saw this as Ms Ford having a specific female stereotype to which she

expected the Claimant to conform. Mr Atkinson saw the reference to the Claimant being *"one of the boys"* as a reference to the Claimant's being a popular member of the office, who went to all the social events and stayed late. He understood Ms Ford to have been trying to advise the Claimant about the need to maintain a degree of distance when stepping into a leadership role.

100. We find that Ms Ford did not use the word *"ladette"* as we accept that term is not the sort of language she would use. However, she did make a remark about the Claimant being *"one of the guys"* or *"one of the lads"* or *"one of the boys"* and although *"guys"* may be gender neutral, *"lads"* (which Ms Ford accepts she may have said) is not, and nor is *"boys"* so we observe that this is a remark that suggests that joining in with late-night drinking sessions is a male thing. We further find that Mr Atkinson did use the word *"ladette"* when relaying this comment to the Claimant as we accept the Claimant's evidence that this was the first time she had heard this term and she had to look up what it meant.

<u>September 2019</u>

101. In September 2019 the Claimant was one of eight *"future leaders"* identified by Mr Lee to meet Mr Dodig (President and Chief Executive Officer, based in Toronto) when he visited London (531). She was also asked by Mr Lee to help prepare for the Power of Inclusion event that takes place during his visit. Again, the Claimant regarded this as 'tokenism' on Mr Lee's part, intended to reflect well on him and not to advance her career. We reject the Claimant's argument on 'tokenism' in relation to this incident for the same reasons previously given, i.e. that Mr Lee's support for the Claimant went well beyond the 'tokenistic'.

<u>October 2019 onwards – change in Claimant's work</u>

102. There is broad agreement between the parties that from October 2019 onwards the Claimant was spending (and was expected to spend) nearly all of her time working on the Luxembourg project and that other areas of her work were very much reduced. The front office controls work she handed over to Mr Phillis and his team. The Claimant regarded herself as fulfilling the CRO/COO role from this point onwards, but what she wrote in her appraisal for the year end 31 October 2019 (646), in text that the Claimant entered on the Respondent's system on 23 January 2020, suggests that she did not regard herself as having actually started that role as at that point as she states: *"I am very grateful for the opportunity to be considered for the role of COO and CRO for Luxembourg and very much looking forward to helping … additionally, having an executive coach to help me with personal development is going to be crucial to develop the gravitas that I need for the new roles"* (646). As we found earlier in relation to the Claimant's view as to when she took on regulatory responsibility for the Luxembourg office, we find that the view now advanced by the Claimant as to the role she was doing

from the end of October 2019 does not reflect what she understood to be the case at the time. Although the Claimant was working almost exclusively on the Luxembourg project from this point on, she was doing so in terms of project set up and personal preparation for the COO/CRO role. She was not actually doing the role, and did not think so at the time.

103. So far as the business development element of her role was concerned, this had already fallen away to a large extent. From the Respondent's perspective, this was because the Claimant was not performing successfully in that role. The business development element of the Claimant's role reported to Mr Autotte. Mr Autotte told Mr Atkinson on numerous occasions that he was not satisfied with the Claimant's performance and that he found her to be 'reactive' rather than 'proactive'. Over time, Mr Atkinson understood that Mr Autotte had stopped giving business development work to her. In November 2019 Mr Autotte left the Respondent. Mr Atkinson reflected his understanding of Mr Autotte's view in the Claimant's 2019 performance review, which was carried out in January 2020 (after Mr Autotte had left). Mr Atkinson noted that the Claimant had moved away from business development towards the COO/CRO role in Luxembourg that she had been offered. He described it as *"a huge opportunity for Fang to demonstrate her undoubted potential"*. He noted that there had been *"limited engagement"* by her in the business development work and that she had struggled to understand the expectations of the Head of Global which had *"somewhat hindered her progress and clouded the value she has actually provided"*. The Claimant disputes that she was struggling with the business development role as she says that Mr Atkinson had no involvement in business development, which had been dealt with by Mr Autotte. However, she did not trouble to dispute the comments as she felt that it was not relevant to her future career. Likewise, she did not dispute what he said about a reduced bonus award at that stage for the same reasons. We find that the Respondent (Mr Atkinson in particular) genuinely believed that there had been performance concerns with the business development work and that was why it had ceased and the Claimant did not seek to disabuse him of that view. Both parties are agreed that, whatever the reasons for it, the Claimant had ceased to do any business development work by the end of 2019.

<u>Executive committee meeting 30 October 2019</u>

104. On 30 October 2019 there was an incident at an Executive Committee meeting where the Claimant criticised the Toronto compliance function in a way that caused offence and was considered by others present to be inappropriate. After the meeting, she prepared an email which she sent in draft to Mr Atkinson seeking to explain her comments, but also apologising and explaining that she had learned lessons from this about how to raise such issues in future (650). Mr Atkinson felt that the email was still inappropriate and helped her redraft it. The Claimant then spoke to Chris Climo (Vice President, Capital Markets Compliance and Deputy Chief Compliance Officer, Toronto) and a further email exchange gives a flavour of what happened at the meeting (654). Mr Climo wrote: *"I just wanted to confirm that*

as we agreed you will be sending an email to all who attended Exco on Wed to correct your statement that the Control Room in Toronto had made a lot of mistakes and you had concerns with relying on them. As we discussed in the call yesterday there was no factual basis to that statement." The Claimant responded that she would do so and then did send an email of apology *"for this misrepresentation"* (655).

105. This incident raised some concerns about her suitability for the COO/CRO role. Mr Autotte had also commented to Mr Atkinson that, in the light of the Claimant's performance in the business development function, he did not think she was ready for a COO/CRO role.

106. Ms Ford also had concerns about the Claimant as she had received negative feedback about the Claimant from Meghan Foreman-Purves (Head of Legal for Europe, based in London) and Robert Eatwell (Chief Financial Officer, Europe and Asia Pacific, based in London). They had been meeting with the Claimant as part of her learning more about the Respondent's infrastructure functions in Europe, and they commented to Ms Ford that they were surprised at the gaps in the Claimant's knowledge of the business.

107. Mr Lee was keen to find out how she was getting on with the executive coach and emailed Mr Atkinson on 25 November 2019 (699) asking that he reiterate to the coach that *"our objective is to have Fang be a better leader and a trusted partner with senior business and infrastructure support executives"*.

108. The Respondent was due to obtain the keys of the Luxembourg premises on 2 December 2019 and on 25 November 2019 Mr Lee agreed with Mr Atkinson's suggestion (698) that the Claimant should attend with him and Mr Hempshall to walk through the office.

109. The various concerns about the Claimant led Ms Ford to call a meeting on 29 November 2019 which we deal with below. Before that, we must back-track to deal with two other 'threads' about which we have heard evidence, first, the grading of the COO/CRO role under the Respondent's job evaluation system; and, secondly, the compensation for the role.

<u>Grading of the COO/CRO role</u>

110. The Respondent has a job evaluation process, which is the responsibility of a Toronto-based team called Organisation, Design and Effectiveness (ODE). The job evaluation process is intended to assess the complexity and seniority of a particular role and the 'title' (Executive Director, Managing Director, Vice President, Senior Vice President, etc) rides on the level at which a job is evaluated to sit. The job evaluation does not align with any particular salary level. Roles at the same level may be paid at very different rates depending on in which part of the organisation the individual sits. However, the title of a role is an indicator of seniority that is recognised across different organisations in the sector and thus is of some importance to employees as when moving between organisations the title will signal to any subsequent

employer the level of seniority of the individual. The Respondent's standard procedure is for job grading always to be determined before any offer is made to an employee. This information is entered on the Respondent's (internal) 'Term Sheet' document which records details in relation to all offers of employment, including not only as to role, grade and compensation, but also as to alternative candidates for the role.

111. The Claimant's role to which she was appointed at the start of her employment was a Level 9 (L9) role.

112. On 1 March 2019 Ms Ford contacted ODE to ask for their assistance in grading the roles for the Luxembourg office (237). She also began discussing the role grading with Mr Lee and Mr Atkinson. Mr Lee and Mr Atkinson were from the outset of the view that the combined CRO/COO role would be an L10 role, but that if the roles were kept separate they would be L9 roles. Initially, ODE appeared content with that, identifying both the CEO and COO/CRO roles as L10 roles (2086). However, ODE then completed their evaluation and decided that while the CEO was appropriately graded as L10, the COO/CRO combined role should be L9.

113. On 26 September 2019 Mr Atkinson became aware of this decision. He felt strongly this was wrong, that the role should be L10 and raised it with Ms Ford and Mr White and Mr Lee. Mr White also thought it should be L10 (569). Ms Ford and her line manager Len Geofroy thought it should be a Level 9 and questioned the logic of Mr White's, Mr Lee's and Mr Atkinson's arguments, even to the extent of asking whether the Claimant had been promised an L10 and whether that was really why they were sticking to L10 (582).

114. Together Ms Ford, Mr White and Mr Lee reviewed the job description. After discussion, they agreed that not all aspects of the job had been included and Mr White, Mr Lee and Mr Atkinson were clear that when all aspects were included the job was properly classed as L10 rather than L9 (640, 705). Ms Ford adopted a neutral stance at this point, handing the decision back to ODE, pointing out as she did so that the role was COO/CRO for an office of c 20 employees (i.e. a small office by the Respondent's standards) (645). By 7 November 2019 ODE remained of the view that L9 was the proper grading (668), but that the role could be filled with an L10 employee *"if the market compensation aligns more with an L10 band"*.

115. Mr Atkinson, Mr Lee and Mr White were still not happy with this grading. By 24 December 2019, Ms Ford was writing (790) to Mr Geofroy and Mr Silverthorn setting out again the arguments with regard to whether the role should be L9 or L10. In this email, the argument has become focused on the personal attributes and circumstances of the Claimant rather than an objective analysis of the role. Ms Ford notes that there are still lingering concerns about the Claimant who is not yet showing the *"leadership attributes"* of either an L9 or L10 and that *"her salary is on the high side, even for a level 10 in Risk at gbp175k"*. She states that if the Claimant does not accept then Mr Lee and Mr White are *"prepared based on their reservations*

to seek another candidate". She recommended sizing the role as L10 because *"if we hold off on the sizing and it's adjusted to a level 10 during 2020, [the Claimant] would expect a salary bump at that time which would not be justified given her current base"*. In a subsequent email, she noted that Mr Lee and White felt that Mr Legge, the then candidate for Head of Compliance for Luxembourg, could be *"a very good option"* as a back-up. Mr Silverthorn replied to say that he was comfortable with the Claimant moving into the role sizing it as L10, but for another candidate it might be sized as L9 or L10. He noted that it was *"not ideal"* to work with the level *"being somewhat individual dependent"*.

116. By 30 December 2019 Ms Ford reported to Mr White that agreement had been reached on the role being L10 for the Claimant, but possibly L9 for someone else (799). Ms Ford referred to the *"job level concerns and reservations we have with [the Claimant] comp etc"*. Ms Ford explained that she meant the concerns that had been raised by others, and the fact that the Claimant was already well paid for her level. Despite what Ms Ford said here, when Mr Legge was in the end appointed to the role (in circumstances we deal with below) no question was raised about changing the role sizing to L9 and the role remained as L10. Ms Ford explained, and we accept, that this was because local management had always wanted it to be L10 and, having achieved that goal, there was no appetite to re-open the issue when Mr Legge was appointed.

117. It was suggested by the Claimant that Ms Ford was in the course of the lengthy debate about grading of the role deliberately arguing that the role should be an L9 in order (and we intend no disrespect to Ms Tutin by paraphrasing) to depress the Claimant's pay/prospects and/or because she considered the Claimant as a woman was not 'worth' an L10. We reject this argument. We find that Ms Ford was simply doing her job as Head of HR to mediate between the view of Toronto and the view of the local managers as to the grading for the role. There was, in our judgment, a compelling argument for grading it L9 and we see nothing untoward in those circumstances in Ms Ford seeking initially to steer local managers towards the Toronto grading rather than the other way round. Indeed, even if there had not been a particularly compelling argument, as we understand it, it would have been Ms Ford's role to represent the Toronto view to local management. In the event, of course, local management were more firm about their position than Toronto and ultimately it was Ms Ford who found a way of arguing the case with ODE (based on the Claimant's personal circumstances) for grading the role as L10. We can see nothing in the lengthy debate about role grading to suggest that the fact the Claimant was female affected Ms Ford's approach. She was just trying to resolve a dispute.

Compensation for the COO/CRO role

118. Although the Respondent had obtained information from Deloitte for the purpose of setting staff budgets for the 5-year plan to include with the CSSF application, the Respondent has a separate process for determining what

compensation actually to offer to staff. Its Total Rewards Team in Toronto gauges the market by reference to data supplied by McLagan. At a local level, HR and managers may also make their own 'soundings' in the market. Compensation has two major elements: base salary and bonus. In addition, employees may be paid other allowances such as role-based allowances, car allowances, relocation allowances and there are also share incentive schemes. All elements of compensation taken together are referred to as "Total Discretionary Compensation" or "TDC". It is the hiring manager in any particular case who is authorised to determine what compensation to offer any particular employee. However, the hiring manager is advised by local HR.

119. In March 2019 Ms Ford began the local process of considering compensation levels for the new Luxembourg roles by speaking to a Luxembourg recruiter, Mr Dedenbach, (232) who indicated that CEO TDC would be in the range E400k-E500k, and COO/CRO combined role in the range E300-E400 (232). This was reflected by Ms Ford in a presentation (the Lux Talent Development Deck) for a meeting with Mr Lee and her line manager on 24 April 2019. She put the range as E300 to E350k (270) for the COO role alone and E250k-E300k for the CRO role alone. These slides identify the Claimant as the potential candidate for both roles. Mr Atkinson and Mr Pellequer were named as potential CEO with TDC suggested at E400k-450k. Ms Ford thus reduced the suggested range for the CEO role by E50k from that suggested by Ms Dedenbach, and did much the same for the CRO role. In oral evidence, she added that a further reason for this in relation to the COO/CRO roles was that the roles as presented on these slides were not combined roles, while Mr Dedenbach had quoted for the combined role. The Claimant did not see any of these slides at the time. The Claimant submits that this is after-the-event justification by Ms Ford and that she was pitching the roles low from the outset because the Claimant (a woman) was earmarked for the roles. We do not accept the Claimant's argument. It is belied by the fact that Ms Ford also reduced the range for the CEO role. Further, at this stage, we find that part of the reason why Ms Ford put slightly lower figures was because she was costing for separate roles in this presentation, and for separate roles within what was still going to be a very small organisation. The information from Mr Dedenbach had also given much lower figures for risk roles, and we infer that may have 'weighted' Ms Ford's view towards the lower end of the range he had given, together possibly with the fact (recorded on the presentation itself) that the Claimant had no prior experience of Luxembourg regulatory work.

120. In May 2019, a costing was done of the roles on the basis of current salaries where an existing employee was earmarked for the role, converting GBP salaries to Euros on a 1:1 basis as that was anticipated to be the likely exchange rate (289). For other roles, Luxembourg market data provided by McLagan was used, taking the average (50th centile or P50) rate for infrastructure roles, while McLagan Benelux data was used on the same basis for front office (revenue-generating) roles. These costings were arrived at in the course of discussions between Ms Ford, Mr Geofroy and the Total Rewards team in Toronto. McLagan is the data source that the Total Rewards team uses as a matter of general practice. The decision to keep

compensation of transferring UK employees 'flat' was based on analysis of the McLagan data which showed that compensation in Luxembourg was generally lower than in the UK, but it was assumed that employees would not wish to transfer to Luxembourg if it meant a reduction in compensation. Employees would also receive a relocation allowance.

121. The McLagan Luxembourg data (used by the Respondent for infrastructure roles) put P50 for TDC at E253k for Head of Risk. McLagan Benelux data (used by the Respondent for revenue-generating roles) put CEO roles at P50 of E755k, and P75 (i.e. 75th centile) at E968k. The McLagan advice (298) noted that COOs in Luxembourg could expect TDC of E225k to E350k, with COOs in Luxembourg paid at the higher end of this range. McLagan noted, *"We would expect Heads Of in Luxembourg to have a similar scope of responsibility and relative org size as CIBC's Luxembourg office Manager role."* We understand the reference to *"Heads Of"* here to be a reference to the data on 296 for the *"Heads of"* Risk role (i.e. E253k at P50). Benelux market data for COOs gave a P50 TDC figure of E343k and P75 at E465k. The Respondent decided that infrastructure (non-revenue-generating roles) were to be matched with the McLagan Luxembourg data and not the Benelux data.

122. In July 2019 the Total Rewards team completed its strategy for compensation and benefits in Luxembourg. Its review of market data concluded that *"across all corporate function groups and levels, the average discount between London and Luxembourg is 8%"*, but with front office staff being paid even less in Benelux. The final recommendation was for employees making a permanent move to Luxemboug, current compensation should be maintained (still with no conversion, just swapping Euros for Pounds). On the specific roles (406), the Claimant's current compensation was compared with market data of E232k, which was E20k lower than the P50 figure for Heads of Risk on the McLagan data and at the bottom end of the range McLagan had advised would be the appropriate rate for a COO of the Respondent's Luxembourg office (i.e. E225k to E350k), but higher than her current compensation as recorded on this chart (which was £225,500). No market data was used for the CEO role comparison, despite it being available. This chart shows the Claimant as being paid slightly lower than the market rate arrived at by the Total Rewards team, but that is because it uses the part-year bonus of £50k that she received in the first year, rather than the £72,750 she received in 2019. Once the higher bonus was included in her TDC, her TDC was £247,250 and thus higher than the market rate as arrived at on this slide. One of the Claimant's evidential comparators, Mark Beels, features on this slide in role Finance L9-1 (Mr Beels). The chart shows his current compensation as 12% below the market data for Luxembourg.

123. On 24 July 2019, Ms Ford updated the Lux Talent Development Deck presentation (451) for Mr Lee and Mr Geofroy. This now showed a combined COO/CRO role as E300k-E350k with it graded at L9 (457). This was still based on the view of Mr Dedenbach rather than the work that the Total Rewards Team were doing (albeit weighted by Ms Ford for the reasons we

have identified by previously) as she had not looked at the McLagan data at that point.

124. From September 2019 Mr White, who was the hiring manager for the COO/CRO role and therefore ultimately responsible for determining salary, began discussing salary for the role with Ms Ford. Ms Ford shared data with Mr White about McLagan's market research indicating a TDC figure of E300-E500k and salary of E200-E300k (2730-2731) and stating (incorrectly) that the guidance from a local headhunter (i.e. Mr Dedenbach) had been that an external hire would be E250K TDC. In oral evidence, Ms Ford said that this was a typographical error and she meant E350k. We have been troubled by this. We do not consider that the error was deliberate. It is implausible that Ms Ford would have deliberately given Mr White wrong information. We have considered carefully whether this was really a "typo" as Ms Ford said in oral evidence. We do not consider it was a "typo", i.e. that Ms Ford knew that Mr Dedenbach had recommended E300k-E400k (which she had weighted down to a range ending with E350k), but mistyped as E250k. We find that the more likely explanation is that Ms Ford did not refer back to her notes, but had misremembered the information from Mr Dedenbach and was instead going by 'feel' as to what the numbers were in the light of the further work that she had done with the Total Rewards team in the intervening months. The figure of E250k that she gave was essentially in line with the McLagan data for Heads of Risk in Luxembourg, and the recommendation from Total Rewards, and Ms Ford's acknowledgment to Mr White that the Claimant was 'overpaid' in comparison to Luxembourg market data reflected the view reached by Total Rewards about the London roles generally.

125. Mr White took this as an indication that the Claimant was currently paid E60k more than the market rate, which was a bigger difference than there actually was because of the mistake Ms Ford had made. Later Mr White checked with Sam Harvey of Carr Lyons, a London-based recruitment agency (717-718). Following an initial telephone conversation, Mr Harvey recommended a base salary of E140k-E150k and total compensation of E225k-250k. Mr White then sent him the full job specification, commenting, *"Remember that although span is broad, office is small – and there will be support elsewhere: so credit in London etc"*. Mr Harvey confirmed that his initial view remained the same. Although the range indicated by Mr Harvey was lower than what was proposed for the Claimant, Mr White did not seek to reduce the compensation offer to her.

126. The Respondent had not had a good financial year in 2019. The Capital Markets bonus pool was down and Mr Lee was keen to reduce costs where possible (708). The depression of the Capital Markets bonus pool affected Mr Pellequer's bonus for 2019, but not the Claimant's as she was in the (non-revenue-generating) infrastructure pool. The Respondent's bonus policy is that, so far as possible, the revenue-generating roles bear the brunt of performance fluctuations, while TDC for non-revenue-generating roles is kept more steady state.

127. By 17 December 2019 discussions were still going on by email regarding the offer to be made to the Claimant (783). In that email discussion (779) Mr Geofroy noted that the Claimant's compensation was higher than Risk in Capital Markets, and asked Ms Ford where she thought 'the bump' should come, to which Ms Ford replied that the intention was to keep both base and bonus flat (779). However, Mr White's view was that the Claimant should be allowed a bigger potential bonus budget than the bonus she had received in 2019 (£100k rather than £72,750). This was where he felt he could justify her offering more than what he viewed as her current total remuneration. It was not relevant to him that the Claimant's bonus budget on her Term Sheet when she joined the Respondent was £105,000. Mr White did not refer back to that at all, but just considered what the Claimant had actually been paid since starting at the Respondent.

128. Discussions also began in October 2019 about which budget would carry the cost for the COO/CRO role. Normally, the COO would have sat in Capital Markets and the CRO would have sat in Risk. Mr Atkinson was responsible for the Capital Markets budget, but Mr White was responsible for the Risk Budget. This required some discussion as CIBC HR/Finance infrastructure did not allow shared funding of direct costs. In the end, it was decided that the whole of the cost needed to sit in Risk, but Risk did not have sufficient budget for this. Discussions were still ongoing regarding this by 17 December 2019 (779ff). Ultimately, it was agreed at the end of December how the cost would be shared between Capital Markets and Risk and approval for the 'plan transfer' mechanism was given on 9 January 2020. This then meant that the offer could be made to the Claimant.

129. By 14 January 2020 all issues as to role grading, compensation and budget were resolved and a Term Sheet was drawn up for the Claimant (906). This recorded the role as an L10 role, salary as E206k (GBP175k), bonus of E117k (GBP100k), and thus TDC of E323k. This was towards the upper end of the range that McLagan had advised would be the appropriate rate for a COO of the Respondent's Luxembourg office (i.e. E225k to E350k).

130. In accordance with the Respondent's normal practice, the Claimant was never shown the Term Sheet. It was agreed that the offer would be put to the Claimant before final approval was sought from Laura Dottori (Global Chief Risk Officer) for both the salary and the role level.

131. Finally, we record here that the Claimant has sought to compare the pay offered to her for the COO/CRO role with that of Mr Atkinson, the Chief Administration Officer (CAO) in the UK, whose base pay was at £250,000 (734). However, we do not find him to be an appropriate comparator. He has been CAO Europe Region for over 10 years and reports directly to Mr Lee. He has far greater accountability than the Claimant would have had in the COO/CRO role. He is CAO of an office of some 300 FTE staff, whereas in Luxembourg there would be only 15-20 staff.

Meeting of 29 November 2019

132. As noted above, discussions about the grading and compensation for the COO/CRO role were ongoing until the end of December 2019. While that process was still happening, Ms Ford called a meeting on 29 November 2019 with Mr White, Mr Lee, Mr Atkinson, Ms Ford and Mr Pellequer to discuss their concerns about the Claimant (704). Ms Ford wanted to make sure that all who were part of the process were still aligned and thought the Claimant was a suitable candidate. Mr Lee was included in the meeting at the instigation of Mr Atkinson (703) who wrote to Mr White *"I think we should include Wayne in the discussion (given Fang was his choice and he is aware of the problems). Your call"*.

133. At the meeting, those present reached the conclusion that the Claimant remained suitable and would develop into the role. There was a certain pressure on them to reach this conclusion as any alternative candidate would have to be approved by the CSSF and there were at that point no other obvious candidates and the prospect of going through the approval process again was unattractive. Nonetheless, we are satisfied that it was not solely because of this pressure that those present decided to proceed with the Claimant: there was sufficient respect for her, and confidence in her, to proceed notwithstanding concerns that had arisen.

134. At the same meeting it was decided to request approval from HR for the COO and CRO job level to go from L9 to L10, but with no increase to the Claimant's compensation. Ms Ford then contacted John Silverthorn in Toronto to request approval and the evidence on role grading we have dealt with above. It is clear from Ms Ford's email of 29 November 2019 (709) that she was concerned about the consequences for both the Respondent and the Claimant of 'getting it wrong' by promoting the Claimant when she was not ready for it, but she felt that she had 'done her bit' by making them all stop and think about it. In a further email of 24 December 2019 (792) Ms Ford notes again that there were some reservations about the Claimant but that people were happy to proceed, and also that her salary is already on the high side even for a L10 role in risk.

135. It was decided at the meeting that salary would be kept flat regardless of the level of the role. Ms Ford thought that bonus should also be kept flat (779), but Mr White disagreed.

Salary conversations with the Claimant

136. The Claimant was not party to the discussions about compensation that we have detailed above. All that she was aware of at the time was the salary budgets for the COO and CRO roles that had been included in the CSSF application which had formed no part of the process for actually setting the salary and bonus for the roles, as we have set out above.

137. In the summer of 2019 the Claimant and Ms Ford had a conversation (either at the lunch on 12 July 2019 or in August 2019) in the course of which the Claimant asked her about likely compensation for the Luxembourg roles and Ms Ford indicated that no decision had been made yet, but that the expectation was for internal transfers to be on the same level of compensation as currently. The Claimant says she asked Ms Ford to take into consideration that compensation for the COO/CRO role should be increased to reflect the new financial liability and regulatory responsibilities of such a role, but the Respondent invites us to reject this evidence as after-the-event invention and to accept Ms Ford's evidence that the Claimant had no strong reaction to what she said about salary. The Claimant in her witness statement added (paras 89-90) that she was surprised by what Ms Ford said, as staying on the same salary would be so out of line with the CSSF application. She thought it was not Ms Ford's decision. The Claimant says that her personal understanding was that as she *"would be performing two persons' work rather than one person's work"* she would be paid at roughly the aggregate of what had been budgeted in the CSSF application for both the COO and CRO roles so that her total remuneration *"would be in the region of E450,000"*.

138. Regarding this conversation, we accept Ms Ford's evidence over the Claimant's: the Claimant did not challenge Ms Ford about the suggestion that compensation would be kept flat. The Claimant's statement on this point is, we find, after-the-event invention. On her own case, the Claimant did not consider it was Ms Ford's decision to make and we find that she kept her views to herself at this point. We further observe that the Claimant's belief that she would be offered two salaries for the combined role was not founded on anything that the Respondent had said or done and was in our judgment unrealistic given that the situation was not one where (for example) two part-time roles were being added together to make a full-time role. What was being contemplated were three different full-time jobs: COO, CRO or combined COO/CRO, each of which could only reasonably be expected to attract a single salary.

139. Following the meeting of 29 November 2019 it was intended that Mr Atkinson and Mr White would speak to the Claimant about salary, but in fact only Mr Atkinson had the conversation. It had been anticipated, correctly, by Mr Atkinson and Mr Pellequer that the Claimant would not be happy with a flat salary offer. Mr Atkinson asked the Claimant to let them know as soon as possible if this was a 'dealbreaker' for her. The Claimant was upset that the offer was made verbally rather than in writing and that the offer was not, she thought, fair and equitable given her experience, qualifications and offers she believed had been made to Caucasian, male colleagues. She did not, however, say any of that to Mr Atkinson, nor did she tell Mr Atkinson that the salary was a deal-breaker. Nor did she say it was discriminatory, let alone that it was discriminatory by reference to any particular protected characteristic. She said she needed to think about it. Mr Atkinson emphasised that she needed to consider the whole package and the larger picture in terms of the responsibilities, and not focus on salary. He said (as the Claimant accepted in cross-examination) that the bonus figure was likely

to be larger. He said that she was naïve for expecting to receive two salaries for the combined roles. He explained that figures in the CSSF form were just placeholder figures. The Claimant felt that she did not have all the information necessary to consider the offer, including bonus indications and relocation allowances. The Claimant maintains that she asked about this, but Mr Atkinson does not recall her asking about this. The Claimant's personal note of the meeting (1072) indicates that the Claimant pointed out that she did not know what the whole package would be, so we accept that she said this, but she did not ask for specific information, or follow up to find out more and we find as a fact that Mr Atkinson did not understand he was to get back to her with that information.

140. Mr Atkinson spoke to Mr White afterwards and indicated that the Claimant was not happy with the money, but he took no further steps, because it was Mr White's decision and up to him what he did about it.

January 2020 Luxembourg offer discussions

141. By the end of 2019 the Claimant was essentially working exclusively on the Luxembourg project and the other parts of her role had ceased. The Claimant was asked in cross-examination whether she knew that if she did not take the Luxembourg role when it was formally offered that she would be made redundant. She did not accept this, seeing the picture differently. She said: *"being officially registered with the regulator* [from mid 2019] *it was from this point legally and from a reputational perspective I was internally and externally announced as the COO and CRO – that was the way for the Respondent to be able to pressure me to take whatever financial package that was offered to me because I did not have a readily available alternative because I had already been asked to divest my other responsibilities"*. We observe that this repeats her misunderstanding about having already taken on the COO/CRO role and also observe that, despite her denial, this does amount to an acknowledgment that her previous role had 'disappeared'. The Claimant did at the time indicate that she considered that she could revert to the business development work (1033), but the Claimant did not in the end pursue this contention at the hearing.

142. As set out above, the Claimant's Term Sheet was drawn up on 14 January 2020 (906). The decision on what to offer the Claimant was Mr White's, but Mr Lee, Ms Ford and Mr Atkinson had all taken an active part in considering what she should be offered and all agreed with Mr White. The Term Sheet was formally approved by Mr Lee (940). It was further agreed that the offer would be put to the Claimant before final approval was sought from Laura Dottori (Global Chief Risk Officer) for both the salary and the role level.

143. On 16 January 2020 Mr White verbally informed the Claimant of the proposed remuneration for the combined COO/CRO role. The Claimant took notes of this meeting shortly afterwards by sending an email to herself. He informed the Claimant that there would be no increase to her base salary, but that there would be *"runway"* to increase bonus on last year and a standard relocation

package. Mr White in oral evidence suggested that he used the word *"runway"* as regards both salary and bonus, but that is contradicted by both the Claimant's notes and his own email sent after the meeting (956) and we reject that part of his evidence – *"runway"* related only to bonus. When the Claimant questioned the salary pointing out that she *"would be taking on regulatory risk where I currently do not have any"*, Mr White made clear that he was not prepared to negotiate on base salary. He explained that this was because of the small size of the office and that the salary was in line with market data. The Claimant complains that Mr White did not give her details of the relocation package, but her own notes taken shortly after the meeting suggest she did not ask about this at the time and we find that she did not.

144. The Claimant did ask for an indication on bonus as is recorded in her notes, but Mr White has a personal policy of never giving bonus indications and he refused to do so with the Claimant. Mr White asked her to reflect. He said that if she did not want the role they would move to 'a plan b' (1016). He did not explain what 'plan b' was. He did not make clear, and the Claimant did not infer, that 'plan b' was that the job would be offered to someone else. The Claimant said that she needed to 'run some numbers' and think about it over the weekend. In her witness statement the Claimant explains that she was *"insulted"* by the offer, that she had in mind the salary figures she had seen in the CSSF applications and that her recruitment contacts had confirmed that compensation of E450,000-E500,000 would be more reasonable. She did not say any of this to Mr White at the time.

145. In an email to Mr Pellequer, Mr Atkinson, Ms Ford and Mr Lee on 20 January 2020 (988), Mr White said that if she had not accepted 'by Wednesday' they should start 'looking at a plan b'.

146. On 20 January 2020 the Claimant had a number of conversations about the salary offer, which she noted at the time (1016-1017, 1067) and which we now deal with.

147. To Mr Atkinson, she said she needed more time to think.

148. She said the same to Mr White, who complained that she had promised to give him an answer that day.

149. To Mr Pellequer, she asked him why he was choosing to go. He said that it was a good career opportunity and an opportunity to get into governance. He said that he had not yet seen a contract or agreed to the offer presented to him and would be taking a net loss by moving to Luxembourg, but that he believed the base salary was not negotiable. Mr Pellequer told her that she would have to respond to the salary offer in two days.

150. In a meeting with Mr Lee, he asked her why she was hesitating. He urged her to think about the big picture and, *"what is 20% increase for you? It wouldn't matter to me, think about the big picture"*. He said he had taken a pay cut to move from the Head of Asia to take on the Head of Asia and Europe. The Claimant thought he was lying about this, but we accept it as he

confirmed it in oral evidence and it is implausible he would have said it if it were not true. He started to tell her about his own efforts to get the Respondent to pay him more by going for an interview with Wells Fargo. She noted, *"He then became visibly embarrassed by the story and said you know you are like a little sister to me and you can always come to me with any issues"*. The phrase "little sister" is one that the Claimant has used in WhatsApp conversation with Lauren Looi (1126). Mr Lee in his witness statement said that he did not think he called her his 'little sister', but that he had said he was like a big brother. In oral evidence, he accepted he may have said 'little sister' and thought that he probably said this because he had revealed vulnerable personal information. He did not regard it as condescending and maintained he would have said something equivalent regardless of the gender of the individual in question. He gave evidence that he also made clear in this meeting that if she turned down the opportunity her current role no longer existed, but this point was not put to the Claimant and we make no findings on it. Mr Lee offered to set up a meeting with Mr Lynn. He believed that had happened, but the Claimant said that it had not happened, and we accept the Claimant's evidence in that respect.

151. After this, the Claimant mentioned to Mr Atkinson what Mr Lee had said about her being his *"little sister"*. The Claimant says that she did this in a private Skype call and that Mr Atkinson agreed it was ridiculous and insulting and showed that Mr Lee did not respect her, but Mr Atkinson denies this. He recalls that the Claimant said that Mr Lee had said that, *"he thought of her as a little sister and that he wanted her to do well and succeed"*. He said that the Claimant did not seem upset about it and mentioned it to other members of the team too. The Claimant alleges that thereafter Mr Atkinson others used the term *"big brother"* to tease her about Mr Lee, but Mr Atkinson denied this. We accept Mr Atkinson's evidence as to this conversation.

152. As Mr Lee accepts he may have used the term 'little sister', and the Claimant repeated this to Mr Atkinson shortly afterwards, we accept this term was used. We also accept that it upset the Claimant, but we do not consider that it was reasonable for it do so. Mr Lee was obviously trying to be friendly and encouraging her to make a decision and the use of the term *"little sister"* as part of a sentence about 'wanting her to do well and succeed' cannot reasonably be seen as offensive.

153. On 23 January 2020 the Claimant met with Mr White at 9.30am. She made clear that although she wished to do the role, the financial offer was not acceptable to her. The Claimant referred him to the figures in the CSSF (1067), but Mr White said he had not seen this and in any event just because she would be doing two roles did not mean that she should get more pay. The Claimant maintained in oral evidence that she asked for clarity on the relocation package and could not make a decision without it, but in her own notes of the meeting (1067) she wrote, *"I said on a personal basis the financials don't quite work for me even though I still really want the role"* and she makes no note of having queried either the bonus indication or the relocation package. We find therefore that she did not query the package, but just said that it did not work for her. We observe that the Claimant may have

thought she was in a strong position because, so far as she was concerned, the Respondent had budgeted more for the roles and had no other options.

154. The Claimant then met with Mr Atkinson at 9.45am. The Claimant's notes indicate that Mr Atkinson suggested that the Respondent may ask the Claimant to resign as there was no role left for her and the Respondent was looking at other options (1017). In her own words noted at the time, the Claimant asked if this was *"because I turned down the 'offer'?"* Mr Atkinson responded along the lines of *'in the time you took to think and come to this conclusion, the Respondent looked at other options'.*

155. On 23 January 2020 Mr White, Mr Lee, Mr Atkinson, Mr Pellequer and Ms Ford met to discuss next steps. The outcome of the meeting was communicated by Ms Ford by email at 12.36pm (1095).

156. Ms Ford explained to Anna Goncalves (Vice President, Human Resources) that the Claimant had 'turned down the role based on a salary of E206k with a verbal indication that the AIP had good runway'. She reported that Mr White, Mr Lee, Mr Atkinson and Mr Pellequer were all in agreement that they were not going to 'counter' with a revised offer to the Claimant as there *"were niggling doubts about her maturity for the role"*. There was thus a conscious decision not to make an increased offer to the Claimant in the light of her refusal. Ms Ford noted in her email, *"Good news is we have a back up",* which was a reference to Mr Legge (1095). This email makes clear that Ms Ford was unaware prior to this point that unless the Claimant took the Luxembourg role she had no role left at the Respondent.

157. Ms Ford then noted that the Claimant may need to be added to the P20 list (1095). The P20 list was a list that the Respondent used on occasion when it was funding redundancies across the business. Ms Ford was aware of it being used on one occasion prior to January 2020, but not since. In order to be included on the list there had to be an intention to eliminate a role, but it did not follow that the individual would necessarily be dismissed. Some people on the P20 list were found alternative employment. There was a degree of urgency about getting the Claimant on this list as the financial quarter was ending on 31 January 2020 and getting a name on the P20 list was necessary in order for any termination payment to be funded by the wider business rather than the local business. In answer to a question from Anna Goncalves as to whether the Claimant's role was being eliminated, Ms Ford confirmed that it was, and then confirmed that Mr Lee approved adding the Claimant to the P20 list.

158. In further emails that day, Mr White explained (1015) that as they believed the offer to the Claimant was *"competitive"* they would move forward with 'plan b', Mr Legge, which he expected to be *"net cost positive, no relocation cost and a potentially lower base than [the Claimant]"*.

159. We asked Ms Ford in oral evidence, in connection with the decision not to make a counter-offer to the Claimant, whether she was conscious that there may be differences between men and women in terms of their willingness to

negotiate salary. Ms Ford acknowledged that historically that had been an issue, but she considered it was now much more equal. She felt that the Claimant had had plenty of opportunity to negotiate if she had wanted to. Three senior individuals had spoken to her in separate 1:1s to try to persuade her to take the role. She did not think there would have been any difference in approach for a man in the same position. She said that the Respondent would not have negotiated against itself for a man who had refused an offer without making a counter-offer either. We accept her evidence as her honest opinion, but make our own factual findings in the conclusions section below.

Mr Legge and the Luxembourg COO/CRO role

160. Mr Legge was a White Caucasian male. He was an external candidate who applied for the new position of Head of Compliance/Money Laundering Reporting Officer in Luxembourg and was selected as the best candidate for that. In that role, he was offered a salary of E167,500, together with potential bonus of E90,000 (like the Claimant not guaranteed, and not notified to him). In response to this offer, he raised the point that in Luxembourg with effect from 1 January 2022 there is a 2.5% compulsory indexation pay increase to all base salaries. Mike Donovan (the recruiting manager for that role) agreed to increase the base salary offer by 1.5%.

161. In the meantime, Mr Legge had been noted by the Respondent on 24 December 2019 as a *"very good"* back up option for the COO/CRO role if the Claimant did not accept it (789). However, he was not formally noted as such on the Claimant's Term Sheet when that was drawn up on 14 January 2020 (906).

162. The Respondent considered that Mr Legge had greater experience than the Claimant, particularly in Luxembourg, where he had been working since 2011 for CSSF regulated entities, and had previously held a role as CRO for an entity which was both a CSSF regulated entity and one of the Respondent's peer Canadian banks.

163. On 23 January 2020, Mr White, Ms Ford, Mr Lee, Mr Pellequer and Mr Atkinson met to discuss 'next steps' in the light of the Claimant's failure to accept the offer for the COO/CRO role. Mr Legge was identified as the 'plan b' option. Mr White felt that he would need development, coaching and mentoring but could take on the role. There was general enthusiasm for the appointment of Mr Legge. Chris Climo (who was the person who had complained about the Claimant's conduct at the Executive Committee Meeting on 30 October 2019) expressed the view that Mr Legge *"could do the job for sure and frankly far better than [the Claimant]"* (1010).

164. On 28 January 2020, Mr White and Mr Atkinson met with Mr Legge to speak to him about the COO/CRO role. He was keen, and Mr White and Mr Atkinson agreed he would be suitable, and he was verbally offered the role. He was offered a lower salary than the Claimant (1077) at salary E190,000, but with

the same 'runway' for bonus of E107,000, giving a TDC of E297,000, some E26,000 below the Claimant. In accordance with his normal policy, Mr White did not when making the verbal offer to Mr Legge tell him how much his bonus might be. The role remained an L10 role. Mr Legge accepted the offer.

165. On 31 March 2020 the Respondent informed the CSSF that Mr Legge had been appointed *"as the new [COO], [CRO] and Information Security Officer of the future credit institution CIBC Capital Markets (Europe) SA"* (1251, 1265).

Mr Davy and Mr Beels and Ms Ben-Shaul

166. Mr Davy, Mr Beels and Ms Ben-Shaul were existing employees who transferred to Luxembourg. They are all White Caucasian. The Claimant alleges that Mr Beels and Mr Davey were given written term sheets and a chance to negotiate their terms. In oral evidence she accepted that no one received the term sheets, but maintained that others were given offers in writing. The Respondent says that the Claimant did not get an offer in writing because the Claimant did not accept the offer. We accept that this is the Respondent's policy and that no written offers were provided to employees until they had accepted the verbal offers.

167. As to their financial offers, Mr Davey was not a permanent transfer. He was seconded from London to Luxembourg for 12 months as the Executive Director of Liquidity Management. His salary stayed the same, being paid in pounds with no exchange rate applied. He was provided with additional relocation support because, unlike the Claimant, was only being seconded rather than permanently transferring and was thus not expected to give up his UK accommodation to make the move.

168. Mr Beels was to transfer to Luxembourg as Head of Finance; there was a question as to whether it would be a temporary or permanent transfer, but for the right money Mr Beels was prepared to transfer permanently. When Mr Beels had a preliminary chat with Ms Ford about salary, he indicated that he was looking for an increase in base salary to do the Luxembourg role and Ms Ford noted that and reported it back Mr Geofroy and others (695). She made out a case to Mr Geofroy that Mr Beels should have a salary increase and Mr Geofroy agreed. The rationale was that Mr Beels had a base salary of £83,650 on a L9 role, which was below the 25th centile for Luxembourg and UK rates, and below the general L10 salaries in the UK which were in Ms Ford's view £120k to £140k. Ms Ford proposed increasing his offer to E110-115k, just below the 50th centile for a UK-based L9. However, Mr Beels wanted E130,000. As external candidates interviewed were being paid at that level and Mr Beels' manager, Robert Eatwell (Vice President and Chief Finance Officer for Europe and Asia, London office) thought Mr Beels was the better candidate, it was agreed on 26 January 2020 to increase his salary to E130k with TDC of E155k (2605). This brought him up to above 75th centile of Luxembourg and over 50th centile for UK (2340). Ms Ford also proposed a car allowance. Ms Ford/HR were supportive of the uplift, but it was the

business's decision (Rob Eatwell, the hiring manager) as to what to pay. Unlike the Claimant, the offer to Mr Beels was thus not taken away when Mr Beels refused the first offer, and he was given time to respond and permitted to negotiate.

169. Martina Ben-Shaul was being paid less than a new joiner, Adam Redland, who had been offered a salary equivalent to his salary in his previous role, which was E30,000 higher that Ms Ben-Shaul. Mr Pellequer spotted this and made out a business case for raising her salary, not only to achieve equality, but because Ms Ben-Shaul would be regularly commuting back to London for her two sons and it had been challenging to find Fixed Income sales people in that salary bracket. Ms Ben-Shaul was then offered a salary rise (864). The Claimant maintained in oral evidence that this was evidence of discrimination as it had only happened 'after a complaint'. However, it is clear from the documentation that this is not what happened. What happened is that the pay discrepancy was picked up by Ms Ben-Shaul's line manager and corrected before any offer was made to her. That is not evidence of discrimination, it is evidence of proactive efforts to maintain equal pay for like work.

Mr Pellequer and the Luxembourg CEO role

170. When the pre-filing application had been made to CSSF, Mr Atkinson had been identified in the CEO role as a 'placeholder'. In May 2019, Thomas Pellequer indicated to Mr Lee that he would like to be considered for the CEO role. Mr Pellequer was Managing Director and Head of the Corporate Solutions Group in London. He was consistently the highest revenue-generator in the London office and thus one of the highest paid individuals in London.

171. Mr Lee initially thought that Mr Pellequer would be a good candidate (532), although he was also in favour of looking at external candidates. He had some concerns about Mr Pellequer stepping up to a managerial role, both because it might mean losing their largest producer and also because Mr Pellequer did not have prior experience of management responsibilities. Mr Lee considered that Mr Pellequer would need to develop in some areas, but that these were fairly minor areas (536). By September 2019 Mr Pellequer had support from Toronto (532). Mr Atkinson approved. It was Mr Lee who determined the salary for the role. The plan was that Mr Pellequer would continue with his role of Head of Corporate Solutions Group as well as taking on the role of CEO in Luxembourg.

172. The Claimant says that Mr Atkinson told her that Mr Pellequer was only 60% ready for his role, while she was 90% ready for hers. Mr Atkinson does not recall making such a remark, and does not believe he would have done. He considered that they both required development for their roles. In November 2019 arrangements were made to appoint an external coach for Mr Pellequer (788), but no formal development plan was drawn up for him at this point. We find that Mr Atkinson did make the comment alleged by the Claimant, or at least said words to the effect that she was further advanced in preparation

for the new role than Mr Pellequer, as this is the sort of encouraging thing he would say, and she had in fact drawn up her development plan months before Mr Pellequer did his and had been preparing for the role since at least the autumn of 2019. In terms of work done in preparing for the role, she was therefore further ahead than Mr Pellequer, albeit that they both required development and no specific concerns appear to have been raised about Mr Pellequer over the period as were raised in relation to the Claimant and discussed at the meeting on 29 November 2019.

173. The compensation proposed for the CEO role in the applications to CSSF, based on advice from Deloitte had been £900,000. Ultimately, what was offered to Mr Pellequer totalled E1,025,000 (757). In 2018 Mr Pellequer had received a base salary of £250,000 and a bonus of £775,000. Because the European Banking Authority required bonus not to be more than 100% of a person's fixed salary, Mr Pellequer was offered a fixed salary of E275,000, a role-based allowance of E275,000 and a target bonus of E475,000 (with a maximum of E550,000 in line with the bonus cap). Mr Pellequer accepted the verbal offer and then a formal written offer was sent to Mr Pellequer on 17 December 2019. He then pointed out that because of the exchange rate his base salary offer was lower than his current salary. He was very unhappy with Ms Ford (778). He told Mr Lee that he would consider the written offer and get back in the new year (778). Mr Lee acknowledged this was a mistake and was keen to get it corrected (942). His salary was increased to E300,000 and role-based allowance reduced to E250,000 so that target compensation remained E1,025,000. This gave Mr Pellequer total compensation that exceeded the 75th centile for CEO roles based on the McLagan data (663), and was more than double what had been advised as appropriate for the role in March 2019 by a Luxembourg-based recruiter (232). However, it was less than what he had actually received as TDC in 2018 which was £1,025,000 sterling. Euros were less valuable at that point.

174. In fact, the Respondent had a relatively poor financial year in 2019 and Mr Pellequer's compensation for 2019 was lower than for 2018: £550,000 bonus and £250,000 salary (732), plus 50k special RSA (948). This was known by December 2019, but no one revisited the offer that had been made to him in the light of that, despite a suggestion by Mr Scully in October 2019 to do just that (625). This was because, as Mr Geofroy wrote in an email at the time (661), and as Mr White confirmed in oral evidence, it was accepted that 2019 had been a poor year and as it was intended that Mr Pellequer would continue his current revenue-generating role as well as taking on the CEO role so the Respondent wanted the 'flexibility' to be able to reward Mr Pellequer at levels commensurate with his previous earnings *"if next year is a great year"*.

175. In February 2020 Ms Ford made suggestions to Mr Pellequer about items that he could put in a training plan (1096). This was needed for his 'fit and proper' form for submission to the CSSF. He duly incorporated this (1223). This is the first time that a formal training plan was put together for Mr Pellequer.

Redundancy

176. As already noted, in an email exchange of 23 January 2020 around 12.36pm Ms Ford refers to Mr Atkinson having 'dropped in' to the conversation about the Claimant refusing the Luxembourg offer that *"there's no role for her in his team in London anymore"*. Ms Ford then confirmed in response to a query from Anna Goncalves that the Claimant's UK role was being 'eliminated' (1094). Mr Atkinson confirmed that he had decided that her role no longer existed, because that was the result of the process of migrating her duties to Mr Phillis that had happened over the previous three months. Mr Atkinson explained that the nature of the work the Claimant had been doing had changed on transfer to Mr Phillis as a result of reorganisation of outsourcing arrangements and it would have cost money to undo what had been set up in that regard with third party contractors. He did not give any consideration to doing so and there was no discussion about it.

177. Mr Atkinson discussed with Ms Miles what should happen to the Claimant in the light of her failing to accept the COO/CRO role and it was agreed that she should be put at risk of redundancy as her front office controls role had been fully absorbed into Mr Phillis's team and she was no longer doing the business development role.

178. Ms Ford, Mr Atkinson and Ms Miles met on 28 January 2020 to discuss in further detail whether or not the Claimant's role had really 'disappeared', as a result of which they concluded that, from their perspective, it had (1034).

179. It was agreed that Mr Atkinson would have a formal conversation with the Claimant about risk of redundancy. Ms Miles sent Mr Atkinson draft notes for the conversation by email of 28 January 2020 (1032). These noted that the Claimant had mentioned the possibility of reverting to the business development work, but that this was not realistic as there was not enough such work.

180. On 29 January 2020 Mr Atkinson met the Claimant and gave her a 'heads up' in line with Ms Miles' notes. The Claimant alleges that at this meeting. Mr Atkinson told her that he thought the bank had handled things badly and that he had had a 'massive row' with Ms Ford and that it was Ms Ford who had pressurised Mr White to keep the Claimant's salary 'flat'. The Claimant says that Mr Atkinson said that she had 'burned her bridges' by turning down the role. Mr Atkinson denies that he said any of this. The Claimant said that she had not 'turned down the role', but that she would have been £3,000pcm worse off if the salary was flat. This was based on her research into flat rental rates in Luxembourg. In response, the Claimant alleges Mr Atkinson told her that she could sell her house in London to avoid this loss. The Claimant in her witness statement suggested that she said to Mr Atkinson at this point that she would not be treated like this if she was a man or had kids. That is not in her own notes of the meeting (1068). Mr Atkinson recalled discussing turning down the offer. He recalled that the Claimant's position was that she had not accepted the salary, but wanted the role. So far as he was concerned, there was no distinction between the two. He accepted he had asked her why

she was maintaining her home in London if that put a financial strain on her, but denied saying that she should sell her house. He maintained that he would have asked the same question about the house to anyone.

181. We do not have to resolve all the disputes as to what was said in this conversation. We do, however, in general terms accept Mr Atkinson's version of events as it accords relatively closely with the Claimant's notes of the meeting. We reject the elaboration on those notes that is in the Claimant's witness statement. We therefore find that Mr Atkinson did question why the Claimant was maintaining the house if that put a financial strain on her. He did not explicitly suggest she should sell it, but that was the implication. We reject the Claimant's evidence that she suggested to him that she would not be treated like that if she was a man or had kids. That is after-the-event invention on her part. Despite the Claimant's contemporaneous notes, however, we do not accept that Mr Atkinson told the Claimant there had been a 'massive row' or that Ms Ford was putting pressure on Mr White to 'keep salary flat' as it is apparent from the evidence we have now seen that these things did not happen and we do not therefore consider Mr Atkinson would have said these things although, in keeping with previous occasions when Mr Atkinson has been trying to say something to make the Claimant feel better, he might have said something to suggest that there had not been unanimity as to the handling of the Claimant's case and expressed (in sympathy with the Claimant) anger at how she had ended up being essentially 'out of a job'.

182. Also on 29 January 2020 there was a meeting between Ms Miles, Mr Atkinson and the Claimant at which the Claimant was told her role at the Respondent was at risk of redundancy. At this time it was expected that the Claimant would continue working on the Luxembourg Project until 31 March 2020 (1136).

183. On 30 January 2020 the Claimant had a conversation with Ms Hammond. Ms Hammond was worried that the way the Claimant was reacting to the salary offer would *"negatively influence the way [she] was being perceived by others as [she] was about to take on a more senior role"*. Ms Hammond reported to Ms Ford that the Claimant was 'pissed off'. The Claimant was unhappy about this and made a note to herself that *"If I wanted to make a complaint I would have done that in a more official capacity"* (1064).

184. On 3 February 2020 the Claimant reiterated to Mr Atkinson that she still wanted the role in Luxembourg, given how hard she had worked on the role, but that she still did not want the salary on offer.

185. On 5 February 2020, the Respondent offered the COO/CRO role to Mr Legge.

186. On 18 February 2020 there was an 'at risk' meeting between Ms Miles, Mr Atkinson and the Claimant in which the Claimant was again informed that her role is at risk of redundancy. Again, the Claimant was asking to stay in role until 31 March. The Claimant requested to record this meeting and

permission was refused, but she still recorded this meeting and subsequent meetings.

187. The formal first redundancy consultation meeting took place between Ms Miles, Mr Atkinson and the Claimant on 19 February 2020. Ms Miles said that in the meeting that it was expected that consultation period would last until 28 February and if redundancy was confirmed termination would be 31 March (1146). She provided the Claimant with a vacancy list.

188. As at 5 March 2020, without prejudice discussions were happening between the Claimant and the Respondent. The Respondent had sent a settlement agreement to the Claimant which she was reviewing with her lawyers. Internal emails between Mr Atkinson and Ms Miles (1173-1174) show them both expecting the Claimant to work to the end of the month, and Mr Atkinson was *"loathed to risk her not completing her Mar 31st commitment"*.

189. On 6 March 2020 the Claimant's solicitors sent a first open letter on her behalf alleging discrimination and breach of contract (1176-1186 / 2032). A holding response was sent by the Respondent's solicitors on 10 March (2041).

190. By email of 19 March 2020 Ms Miles emailed the Claimant stating: *"I would like to arrange a further redundancy consultation meeting with you before the end of this week as we are conscious that working arrangements may change further if the Government announces additional Covid-19 restrictions. As before, the meeting will be with Paul Atkinson and myself and we would like to have it tomorrow (Friday 20th March) at 9.30am. I understand that you are currently working from home and, in the current circumstances, we would suggest a telephone meeting is sensible. Paul is, however, willing to have an in-person meeting in the office if you would prefer that."* The Claimant replied asking the purpose of the meeting, in response to which Ms Miles said it was a continuation of the redundancy consultation process following meetings of 18 and 19 February. The Claimant thought it best to include her lawyer in the meeting, but Ms Miles refused that. The Claimant asked again what the meeting was about as she did not think there was anything more to discuss. Ms Miles replied that it was to *"cover off with you (if you have anything more to discuss)"* the proposed redundancy and *"the financial and timing arrangements"*. The Claimant agreed to attend.

191. On 20 March 2020 at 8.26am Mr Atkinson let a colleague know that the Claimant was due to be 'terminated' that afternoon (1199).

192. At 9.30am the final redundancy consultation meeting took place online between Ms Miles, Mr Atkinson and the Claimant. At this meeting, the Claimant confirmed that she had considered the vacancy list and had *"extensive discussions"* but the vacancies had not be been suitable for her (1211-1212). The Claimant queried whether a decision had been made yet about redundancy and Ms Miles confirmed that it had not, and that the purpose of the meeting was to see whether anything had changed, and that a decision would now be made after the meeting (1211-1212). She said that the decision would be made *"within the next few days".* The Claimant said it

was confusing that she had a 'last day' of 31 March, but a decision had apparently not been made yet.

193. Mr Atkinson and the Claimant had a further short meeting without Ms Miles immediately afterwards. Mr Atkinson said that she would probably need to work from home until 31 March as everyone was now out of the office because of Covid-19. The Claimant was keen to come in, but Mr Atkinson dissuaded her saying they could talk by video. He asked if she had a video-enabled laptop and she said yes and he replied *"Yep, just made sure you're decent alright"* to which the Claimant replied *"I always am"* and Mr Atkinson said *"I expected nothing less, so"*.

194. At 12.03 on 20 March (1198), Ms Miles emailed Mr Atkinson to say that, *"The solicitors letter is ready to send so they are going to send it out to the other side asap. Once they've confirmed that is done I will send the letter giving notice of termination today."* She referred to the need to notify IT and security to close of systems access. Mr Atkinson replied to ask if this could wait until Monday. Ms Miles replied, *"No, the solicitors letter has gone."* Mr Atkinson replied, *"I would have preferred to have the opportunity to handover"*, to which Ms Miles responded, *"Sorry, I thought you understood that was what we were doing"*. Mr Atkinson replied: *"I understood the solicitors letter would be sent. I presume termination would follow but not same day."* Mr Atkinson then texted the Claimant to apologise as he said he would have given her a 'heads up' about the early termination if he had known it was happening.

195. The solicitors letter responding substantively to (and denying) the discrimination and breach of contract allegations in the letter before claim was sent to the Claimant's solicitors (2042), then by email at 12.33 Ms Miles sent a letter to the Claimant notifying her that her role was redundant. Instead of the originally proposed 31 March 2021 date, employment was terminated immediately with payment in lieu of notice period (1202).

196. The decision to terminate immediately was a decision taken by Ms Miles and Ms Ford after the meeting of 20 March. Ms Ford did not deal with this decision in her witness evidence and was not questioned about it. In her witness statement, Ms Miles stated that the decision was taken was because *"from an HR perspective, we do not normally like to have employees continuing to work once they have been told that their employment is being terminated"*. We observed to Ms Miles in oral evidence that this could not have been the reason in the Claimant's case because she had been working for over a month knowing that her employment was going to terminate on 31 March, and Ms Miles had not previously indicated to her there was any difficulty with that or that it was in any way dependent on the timing of the last redundancy consultation meeting. Ms Miles then said that it was because they also wanted to allow time for an in-person meeting as lockdown was starting, but this cannot have been the reason either because Ms Miles' own email of 19 March proposed having the meeting by telephone, and anyway whether or not the meeting was in person did not require any change to be made to the planned termination date of 31 March 2020. We have therefore had no adequate explanation from the Respondent as to the reason for bringing

forward the Claimant's termination date from 31 March to 20 March. It is clear from the emails between Ms Miles and Mr Atkinson on that date that the early termination of the Claimant's employment was tied up with the Respondent's substantive response to her solicitors' letter before claim, and that letter before claim was concerned for the most part with setting out the Claimant's allegations of discrimination under the EA 2010. In the circumstances, we are driven to infer that a significant part of the reason why the Respondent terminated her employment earlier than it had previously said it would was because she had made allegations, and threatened proceedings, under the EA 2010.

The Tribunal proceedings

197. The Claimant contacted ACAS on 9 April 2020 and the certificate was issued on 23 May 2020. The Claimant presented her claim to the Tribunal on 19 June 2020. Before presenting her claim, she had requested in correspondence that the Respondent should preserve 'the quote book'. This was the first time that the quote book came to the knowledge of Ms Ford, Mr Lee and Mr White.

198. Ms Wei gave evidence, which was not challenged, that she did not raise a complaint regarding the earlier treatment in 2018 and 2019 because she hoped it would eventually stop and she would not have to take action against CIBC. She was also unaware of the rules regarding limitation, or she would have sought advice. She does not identify when she first instructed solicitors, but it must have been prior to 6 March 2020.

Conclusions

Direct discrimination and harassment

Direct discrimination: the law

199. Under ss 13(1) and 39(2)(c)/(d) of the Equality Act 2010 (EA 2010), we must determine whether the Respondent, by subjecting her to any detriment, discriminated against the Claimant by treating her less favourably than it treats or would treat others because of a protected characteristic. The protected characteristics relied on by the Claimant are her sex and/or race and/or nationality or ethnic or national origin. For short, we will refer compendiously to all characteristics other than sex in this decision as 'ethnicity'.

200. A detriment is something that a reasonable worker in the Claimant's position would or might consider to be to their disadvantage in the circumstances in which they thereafter have to work. Something may be a detriment even if there are no physical or economic consequences for the Claimant, but an unjustified sense of grievance is not a detriment: see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] ICR 337

at [34]-[35] per Lord Hope and at [104]-[105] per Lord Scott. (Lord Nicholls ([15]), Lord Hutton ([91]) and Lord Rodger ([123) agreed with Lord Hope.)

201. 'Less favourable treatment' requires that the complainant be treated less favourably than a comparator is or would be. A person is a valid comparator if they would have been treated more favourably in materially the same circumstances (s 23(1) EA 2010). However, we may also consider how a hypothetical comparator would have been treated.

202. The Tribunal must determine *"what, consciously or unconsciously, was the reason"* for the treatment (*Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, [2001] ICR 1065 at [29] per Lord Nicholls). The protected characteristic must be a material (i.e non-trivial) influence or factor in the reason for the treatment (*Nagarajan v London Regional Transport* [1999] ICR 877, as explained in *Villalba v Merrill Lynch & Co Inc* [2007] ICR 469 at [78]-[82]). It must be remembered that discrimination is often unconscious. The individual may not be aware of their prejudices (cf *Glasgow City Council v Zafar* [1997] 1 WLR 1695, HL at 1664) and the discrimination may not be ill-intentioned but based on an assumption (cf *King v Great Britain-China Centre* [1992] ICR 516, CA at 528).

203. If a decision-maker's reason for treatment of an employee is not influenced by a protected characteristic, but the decision-maker relies on the views or actions of another employee which are tainted by discrimination, it does not follow (without more) that the decision-maker discriminated against the individual: *CLFIS (UK) Ltd v Reynolds* [2015] EWCA Civ 439, [2015] ICR 1010 especially at [33] per Underhill LJ. What matters is what was in the mind of the individual taking the decision. It is also important to remember that only an individual natural person can discriminate under the EA 2010; the employer will be liable for that individual's actions, but the legislation does not create liability for the employer organisation unless there is an individual who has discriminated. As Underhill LJ explained in that case at [36]:

> 36. … I believe that it is fundamental to the scheme of the legislation that liability can only attach to an employer where an individual employee or agent for whose act he is responsible has done an act which satisfies the definition of discrimination. That means that the individual employee who did the act complained of must himself have been motivated by the protected characteristic. I see no basis on which his act can be said to be discriminatory on the basis of someone else's motivation. If it were otherwise very unfair consequences would follow. I can see the attraction, even if it is rather rough-and-ready, of putting X's act and Y's motivation together for the purpose of rendering E liable: after all, he is the employer of both. But the trouble is that, because of the way [what is now the EA 2010 works], rendering E liable would make X liable too …. To spell it out: (a) E would be liable for X's act of dismissing C because X did the act in the course of his employment and—assuming we are applying the composite approach—that act was influenced 'Y's discriminatorily-motivated report. (b) X would be an employee for whose discriminatory act E was liable under [EA 2010, s 109] and would accordingly be deemed by [EA 2010, s 110] to have aided the doing of that act and would be personally liable. It would be quite unjust for X to be liable to C where he personally was innocent of any discriminatory motivation.

204. However, in that case the Court of Appeal also observed, that where a decision is taken jointly by more than one decision-maker, a discriminatory motivation on the part of one decision-maker will taint the whole decision: ibid at [32].

205. In relation to all these matters, the burden of proof is on the Claimant initially under s 136(1) EA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has acted unlawfully. This requires more than that there is a difference in treatment and a difference in protected characteristic (*Madarassy v Nomura International plc* [2007] EWCA Civ 33, [2007] ICR 867 at [56]). There must be evidence from which it could be concluded that the protected characteristic was part of the reason for the treatment. The burden then passes to the Respondent under s 136(3) to show that the treatment was not discriminatory: *Wong v Igen Ltd* [2005] EWCA Civ 142, [2005] ICR 931. The Supreme Court has recently confirmed that this remains the correct approach: *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] 1 WLR 38

206. This does not mean that there is any need for a Tribunal to apply the burden of proof provisions formulaically. In appropriate cases, where the Tribunal is in a position to make positive findings on the evidence one way or another, the Tribunal may move straight to the question of the reason for the treatment: *Hewage v Grampian Health Board* [2012] UKSC 37, [2012] ICR 1054 at [32] per Lord Hope. In all cases, it is important to consider each individual allegation of discrimination separately and not take a blanket approach (*Essex County Council v Jarrett* UKEAT/0045/15/MC at [32]), but equally the Tribunal must also stand back and consider whether any inference of discrimination should be drawn taking all the evidence in the round: *Qureshi v Victoria University of Manchester* [2001] ICR 863 per Mummery J at 874C-H and 875C-H.

207. We have also directed ourselves to *Bahl v Law Society* [2003] IRLR 640, in which Gibson LJ provided helpful guidance on the approach to reasonableness and unreasonableness in a discrimination context. We take from that the principles that we must not equate unreasonableness with discrimination, but that unreasonable conduct requires an explanation and may, in combination with other evidence, provide the basis for an inference of discrimination.

Harassment: the law

208. By s 26(1) of the EA 2010 a person harasses another if: (a) they engage in unwanted conduct related to a relevant protected characteristic, and (b) 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. We observe that this is a higher threshold than 'detriment' for the purposes of a direct discrimination claim. By s 26(4), in deciding whether conduct has the requisite effect, the Tribunal must take into account: (a) the perception of the claimant; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect. In

Land Registry v Grant [2011] EWCA Civ 769, [2011] ICR 1390 at [47] Elias LJ focused on the words of the statute and observed: *"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment"*. While the threshold for the type of acts that may amount to harassment is higher than the detriment threshold for the purposes of direct discrimination, the EAT explained at [31] in *Bakkali v Greater Manchester Buses (South) Ltd* [2018] ICR 1481, that harassment involves a broader test of causation than discrimination and a *"more intense focus on the context of the offending words or behaviour"*. The mental processes of the putative harasser are relevant but not determinative: conduct may be 'related to' a protected characteristic even if it is not 'because of' a protected characteristic. The provisions on harassment take precedence over the direct discrimination provisions: conduct which amounts to harassment does not (save where the harassment provisions are disapplied for the specific protected characteristic) constitute a detriment for the purposes of ss 13 or 27: see EA 2010, s 212(1). The burden of proof under s 136 is the same as for discrimination.

Conclusions on direct discrimination and harassment

209. We take each allegation of discrimination and harassment separately, or sometimes in pairs or groups where that is appropriate, but we have also in relation to each allegation, taken account of all the evidence and considered the whole picture.

210. Our findings in relation to each issue are both reflected in, and take account of, our findings set out above about some of the wider themes in this case, including:

    a. At paragraphs 030 about the Respondent's equality and diversity policies and training, specifically that the Respondent's training has been insufficient, but ultimately this conclusion has not assisted us with what happened as a matter of fact in this case;
    b. At paragraphs 31-45 about allegedly discriminatory policy and attitudes at the Respondent generally, and our finding that discriminatory elements are confined to 'banter' and 'loose conversation' rather than reflecting any pervading inequality in the treatment of women as regards work;
    c. At paragraphs 4658, our finding that Mr Lee does not in general have a discriminatory attitude towards women or women of the Claimant's ethnicity.

On 13 July 2018, Mr Lee asked the Claimant at a lunch if she would babysit his daughter (§32.1 POC)

On 18 July 2018, Mr Lee asked the Claimant at work drinks again if she would babysit his daughter and mused that his marriage was suffering (§32.2 POC);

211. Our factual conclusions in relation to these allegations are set out at paragraphs 59-65. We find that the comments were made, but they were made as jokes. The first occasion was, at the time, understood by the Claimant to be a joke; the second was not, but for the reasons we have set out in those paragraphs, the Claimant ought reasonably on both occasions to have understood that they were jokes. The comments do not therefore amount to a detriment for the purposes of direct discrimination, nor do they cross the (higher) threshold for harassment. Further, we find that sex and ethnicity had nothing to do with it (whether for the purposes of direct discrimination or on the broader causation test that applies to harassment) because Mr Lee has made the same joke about a man of different ethnic origin. This is not direct discrimination or harassment.

On 11 June 2019, Mr Lee wrongly accused and publicly reprimanded the Claimant for not providing information on time to the internal audit team without speaking to her first to understand the facts (§32.3 POC);

212. Our factual findings are at paragraph 89. For the reasons set out there, what was said did not have the character of a reprimand. The Claimant was being over-sensitive. This does not cross the threshold for harassment. Nonetheless, we are prepared to accept that it (just) crosses the threshold for a detriment as she was wrongly accused by Mr Lee. However, Mr Lee's remark had nothing to do with her sex or ethnicity but was the result of a genuine misunderstanding. This is not direct discrimination or harassment.

On 11 June 2019, Mr Lee acted in a very rude and dismissive manner towards the Claimant at an Inclusion and Diversity Council offsite (§32.4 POC)

213. Our factual findings are at paragraph 90. We found that Mr Lee did not act in a very rude and dismissive manner at the meeting so these claims fail on their facts.

On 20 January 2020, Mr Lee told the Claimant, at a meeting to discuss why she was hesitating to accept the Luxembourg offer, that she was like a "little sister" which was belittling (§32.5 POC).

214. Our factual findings are at paragraphs 150-152. Although we accepted these words were said, for the reasons there set out we consider that these words did not amount either to a detriment or to harassment. Mr Lee was trying to encourage her to take the role, and to demonstrate that he cared about her and was 'on her side'. The words used were in context kind and not belittling and the Claimant's perception was unreasonable. An equivalent form of words would have been used by Mr Lee if speaking to a man in a similar situation, or to anyone of a different ethnic origin. This is not direct discrimination or harassment.

When the Claimant raised concerns with Mr Paul Atkinson and Ms Cheryl Ford, the Respondent took no formal action to ensure that Mr Lee's treatment of her would not become the accepted way of treating her in the organisation (§34 POC).

215. We have found that Mr Lee's treatment of the Claimant was not unacceptable. We further find that Ms Ford and Mr Atkinson responded appropriately to the concerns that the Claimant raised with them. Ms Ford's acknowledgment that she could have done more was, we find, no more than an indication that in hindsight she could see that she could have done more, but she did not realise (reasonably in our judgment) any more was necessary at the time, or that matters were bothering the Claimant in the way she has suggested they were in these proceedings. The Claimant did not actually raise a formal grievance at any point, despite making clear in her own note following her conversation with Ms Hammond that if she wished to make a complaint about something, she would do so herself. In the circumstances, we do not accept that the Claimant could reasonably regard Ms Ford's and Mr Atkinson's failure to do more than they did as being either a detriment or harassment. Even if it was, there is no evidence from which we can conclude that this was related in any way to the Claimant's sex or ethnicity. The fact that the Respondent's training was insufficient in our judgment does not help us on this: even if more training might have resulted in a more pro-active response from Ms Ford and Mr Atkinson, it does not follow that their actions were influenced in any way by sex or ethnicity. We emphasise that we reach that conclusion despite the *"ladette"* issue below, which we do not find has any bearing on why the Claimant's informal raising of concerns about Mr Lee was met, as it was, by a correspondingly informal and 'low-level' response from Ms Ford and Mr Atkinson. These claims fail.

The Respondent subjected the Claimant to degrading and humiliating treatment at Ms Elaine Ducklin's leaving drinks, at which Mr Lee was dismissive towards the Claimant (§36.1 POC).

216. Our findings of fact are at paragraph 54. The Claimant's evidence about this incident was too vague for us to make specific findings of fact about this incident, but in general terms we found that she was being over-sensitive about what happened at Ms Ducklin's leaving drinks. In the circumstances, this incident did not amount to a detriment or cross the harassment threshold and there is nothing about the incident that leads us to conclude that sex or ethnicity had anything to do with it. This claim fails.

The Respondent subjected the Claimant to a hostile environment at the Christmas party where she (and others) had to listen to inappropriate quotes including of a sexual nature made by employees during the year which were logged in a joke book by Mr Atkinson being read out and then voted on by employees present (§41.6 POC).

217. Our findings of fact on this are at paragraphs 3338. For the reasons set out there we found as a fact in the Claimant's case that she was at the time a willing and active participant in the quote book. We therefore find that, on the

facts, this was not a detriment for the Claimant, nor did it cross the threshold for harassment. Another person who genuinely found the book to be detrimental or degrading could have brought a successful claim about the book, but the Claimant's claim fails as a result of the factual findings that we have made about her perception at the time of the events in question.

The Respondent criticised the Claimant for her relationships with her colleagues, by calling her a "ladette" and saying she was seen as "one of the boys" (§39 POC);

218. Our findings of fact are at paragraphs 9295 and 9899. We found that Mr Atkinson used the term *"ladette"* when relaying Ms Ford's comments to the Claimant and that Ms Ford made a remark about the Claimant being *"one of the boys"*. We accept that the Claimant found these remarks offensive (especially *"ladette"*) and that it was reasonable for her to find the remarks offensive because they are inherently sexist remarks that have their origin in gender stereotypes. There is no equivalent term for a man to a *"ladette"* (that we are aware of) and both remarks were in context intended to suggest that the Claimant was behaving improperly because she was not behaving 'like a lady' or was behaving 'like a man'. They were therefore remarks that were 'related to sex' for the purposes of harassment (even if Ms Ford might have said something similar about a man). These remarks therefore amounted to sex harassment. It follows that they did not amount to direct sex discrimination: EA 2010, s 212(1). The Claimant's ethnicity had nothing to do with these remarks. The Claimant's claim of sex harassment for being called *"ladette"* and *"one of the boys"* is therefore made out, subject to time limits, which are dealt with below.

When the Claimant raised concerns with Mr Atkinson about the cost of living in Luxembourg, he told her that she could sell her house in London (less than two months before the proposed relocation) (§40 POC).

219. Our findings of fact are at paragraphs 180181. We do not accept that what Mr Atkinson said on this occasion can reasonably be regarded as constituting a detriment or as crossing the threshold for harassment. The Claimant had raised financial concerns about an ongoing loss if she moved to Luxembourg on the offered salary as a result of the additional rent she would incur for a flat in Luxembourg. The obvious response to her remarks was to ask whether she could avoid that loss by relieving herself of any property responsibility she had in London so as not to incur double accommodation costs. It was a sensible (and obviously well-intentioned) enquiry by Mr Atkinson and could not reasonably have caused offence. In any event, there is nothing from which we could infer that this remark was influenced in any way by sex or ethnicity. The same point would have been made to anybody and the fact that the move was only two months off at that point did not mean it was unreasonable to imply that the Claimant could consider selling her house as there is no reason in principle why someone cannot move and then sell at a later date. These claims fail.

The Respondent proposed a remuneration package to the Claimant in the combined roles of COO/CRO which was significantly less than that offered to Mr Thomas Pellequer. In particular, the Claimant's base salary was not increased, nor was she offered a role-based adjustment, thereby denying her the opportunity to earn the total discretionary compensation in the COO/CRO CSSF applications. She also did not receive an offer that included a discretionary bonus or relocation package (§§43-53 POC).

220. This claim and all the allegations that follow are allegations of discrimination only (not also harassment). They are in principle allegations of sex and ethnicity discrimination. However, the ethnicity discrimination case was advanced only in relation to Mr Lee. While he did participate in the decision-making in relation to the offer to the Claimant in respect of the COO/CRO role and her subsequent redundancy, and thus could (we accept) in principle have 'tainted' any of these decisions if there had been evidence of an ethnically discriminatory attitude on his part, in fact that case against Mr Lee has failed for the reasons we have set out above. It follows that this and all the subsequent allegations of ethnicity discrimination fail too since each decision is wholly explained by the factors we set out below and, as a result of our findings in relation to Mr Lee, there is no evidence from which we could draw an inference of ethnicity discrimination.

221. Our factual findings in relation to this issue are to be found in particular at paragraphs 118-131 and 0-175 but also elsewhere in the judgment. The Claimant was offered a remuneration package that was significantly less than that offered to Mr Pellequer, but that is because their circumstances were completely different:

    a. Mr Pellequer earned much more than the Claimant already. The Claimant's compensation for 2018 was £175,000 salary plus £50,000 bonus (ie TDC £225,000). Mr Pellequer's TDC was £1,025,000 (comprising £250,000 salary and £775,000 bonus). The Claimant's for 2019 was £175,000 salary plus £72,250 bonus (i.e. £247,250 TDC). Mr Pellequer's TDC was £850,000 (£550,000 bonus, £250,000 salary, £50,000 special RSA). The Respondent's decision to keep TDC flat would thus inevitably result in them still being paid at very different rates.

    b. Although the CEO role and COO/CRO roles were both graded at L10, role grading at the Respondent does not correlate to any particular pay range, in particular between different types of role, with the biggest difference being between 'front office'/revenue-generating/customer-facing roles and 'middle' or 'back office' administrative, supporting, research or regulatory roles. There was much discussion about which roles were of which type, but what is absolutely clear is that Mr Pellequer had been, and was going to remain, a 'front office' revenue generator alongside the CEO role,

while the Claimant was not (once she lost the business development work) doing a 'front office' role and would not, as COO/CRO be doing a front office role.

c. Because Mr Pellequer's bonus:salary ratio had historically been so high, the regulatory bonus cap was relevant to him, but not the Claimant and that required his pay to be restructured to include a role-based allowance so that the Respondent could keep his pay flat.

d. The budget in the CSSF applications was simply not relevant to the remuneration proposed for either the Claimant's or Mr Pellequer's role. Those were placeholder figures based on data supplied by Deloitte's and were not referred to at all in the process of determining what remuneration would be offered to employees. In any event, although it is correct that Mr Pellequer was offered more than the E900k TDC budgeted in those documents, it is significant to note that the Claimant was in end offered very close to what was budgeted in June 2018 for the combined COO/CRO roles (E330k) and in January 2019 for the more highly remunerated COO role (E330k). The Claimant's belief that she should be paid two salaries for doing one job was naïve.

e. Ultimately, what was put on the Claimant's Term Sheet by way of TDC was higher than what she had received in 2018 or 2019 (because the bonus was higher; the fact that her original Term Sheet had had a slightly higher bonus was not relevant as nobody referred back to that for either her or Mr Pellequer), whereas what Mr Pellequer was offered was lower than he received in 2018, albeit higher than what he received in 2019 (a poor financial year). In other words, in comparison to what they had historically been paid, the Claimant was treated more favourably than Mr Pellequer, not less.

f. The offer made to Mr Pellequer was adjusted when he pointed out that because of the exchange rate his salary was not equivalent to his current salary. While this was a 'correction' rather than a 'negotiation', it is significant to note that Mr Pellequer did raise the point himself. The Claimant by contrast did not make any particular counter-offer (other than referring, unreasonably, to the two salaries in the CSSF budget).

222. The Claimant in her Closing Submissions also relies, in relation to pay, on how other men were treated, in particular Mr Beels and Mr Legge. Our factual findings about them are at paragraphs 0169 and 160165.

223. Mr Legge is of course the most appropriate comparator for the Claimant as he was appointed to the role that she was offered, but he was appointed at a substantially lower salary which is a strong indicator that the Respondent has not discriminated against the Claimant. However, the Claimant argues that because he was offered more to do the COO/CRO role than he had been to do the Head of Compliance/Money Laundering Reporting Officer role for

which he applied, this shows that the Respondent was treating him more favourably and invites us to draw the inference that sex had something to do with it. We disagree. Mr Legge was a new joiner. The rule about 'keeping salary flat' did not therefore apply to him. We accept that the reason why he was offered more to do the COO/CRO role is because it was the next rung up the corporate ladder from the job he had applied to do and the Respondent could not reasonably have maintained that he should do it for the same money.

224. As to Mr Beels, it is right that he was allowed an opportunity to negotiate his salary despite being an existing employee, but again his circumstances were quite different to those of the Claimant:

    a. He was doing a different job;
    b. He was underpaid in comparison to other L9s, whereas the Claimant was the highest-paid L10 in her division;
    c. His current base salary was below P25 for equivalent Luxembourg roles, whereas the Claimant's was already close to P50 for equivalent Luxembourg roles;
    d. There were external candidates who were paid more than him, suggesting that his pay was below actual/'real' market rates;
    e. The Claimant's final offer was above P75 for Luxembourg "Heads of" roles on the McLagan data, and Mr Beels' final offer was likewise above P75 for his roles (albeit he was still offered less than the Claimant);
    f. Decisions in relation to his pay were taken by Rob Eatwell and not by Mr White; and,
    g. He sought to negotiate, i.e. he put forward actual counter-offers. The Claimant did not. The closest she came was complaining that she was not being offered the budget for two salaries she had seen in the CSSF application. That was not a reasonable counter-offer.

225. In the circumstances, we do not accept that the Claimant could reasonably regard the offer that was made to her as a detriment. Her belief that she should be offered something close to what was included in the CSSF application for two salaries was naïve, as Mr Atkinson had told her in November 2019. The offer made by the Respondent was a reasonable one given the Respondent's general decision to keep salaries flat. It was especially reasonable given that both Ms Ford and Mr Atkinson had warned her in the preceding 6 months that salary was likely to be kept flat so the Claimant ought to have moderated her expectations accordingly (see paragraphs 136140). Even if the Claimant could reasonably regard it as a detriment, for the reasons we have set out above, she was not less favourably treated than an actual male comparator in materially similar circumstances. Nor is there any evidence here from which we could draw the inference that a man in her circumstances would have been treated differently. Despite our acceptance of elements of discriminatory attitude in the Respondent's office culture (see above), we have not found the Respondent generally to operate a culture that is discriminatory towards women. Indeed, the positive treatment of the Claimant by Mr Lee, the high salary at which she was appointed, the

fact that Mr Legge was offered less to do the same role and the correction (without complaint by Ms Ben-Shaul) of her rate of pay to ensure she received equal pay, all point in the opposite direction.

226. We are therefore satisfied that the Claimant was not directly discriminated against in relation to the pay offered to her. This claim fails.

The Respondent failed to provide the Claimant with any written offer of employment for the combined roles of COO/CRO, despite her full regulatory registration with the CSSF for those roles and being exposed to the associated risks and liabilities for nearly a year (§54 POC).

227. We found at paragraph 0 above that no employee was given a written offer before they had accepted the verbal offer. The Claimant did not accept a verbal offer which is why she was not provided with a written offer. The timing of the offer to her is wholly explained, in our judgment, by the protracted internal negotiations about the grading of her role and the issue about the budget from which her role, as a combined role, was going to come. We accept that the Claimant could reasonably regard the delay in making a formal verbal offer to be detrimental, given the length of time that she had been 'earmarked' for the role, and preparing for it and working on the Luxembourg project generally. However, she was not less favourably treated than any of the men and the evidence we have heard does not lead us to infer that a man in her position would have been treated differently. This claim fails.

The Respondent replaced the Claimant in the combined roles of COO/CRO with Mr Nik Legge (§55 POC).

228. The Respondent replaced the Claimant in the combined roles of COO/CRO because she had refused to accept it on the terms offered by the Respondent. The Claimant has sought to maintain that she did not refuse the role, only the compensation offered, but in law and in practice that is not a possible stance: refusing the compensation was refusing the role. Moreover, she had done so notwithstanding that when previously specifically asked by Mr Atkinson in November 2019 if a flat salary offer was a deal breaker she had not said that it was. Although she complained (unreasonably) that the offer did not match the budget for two salaries in the CSSF application, the Claimant did not make a counter-offer. She turned it down. In those circumstances, the Respondent was left with a decision as to whether to make a counter-offer (negotiating against itself effectively) or offer it to Mr Legge who was the only alternative candidate 'in the frame' (there having been no alternatives identified previously when the matter was considered at the meeting on 29 November 2019). The Respondent's reasons for regarding Mr Legge as a good candidate appear to us to be sound business reasons untainted by sex, and an added bonus was that he would cost the Respondent less, thus saving money which was an important consideration for the Respondent at the time.

In the circumstances, while we accept that the Claimant might reasonably have considered it a detriment that the job was offered to a more junior male, she was not less favourably treated that Mr Legge or any other actual male about whom we have heard evidence. Further, there is ample explanation for why the Respondent did what it did and no room in our judgment for any inference of discrimination. This claim fails.

The Respondent decided to make the Claimant redundant without allowing her time to reconsider the proposal, claiming that she had "burned her bridges" by turning down the offer (§23 POC)

229. The first time that anyone indicated to the Claimant that she may be out of a job if she did not take the role was in her meeting with Mr Atkinson at 9.45am on 23 January 2020. This came after she had formally turned down the offer in the meeting with Mr White 15 minutes' earlier. Had the Claimant wished to say that she would have taken the role had she realised her job was otherwise at risk, this was the moment for her to do it, and events might have turned out quite differently, but she did not. Although Mr Atkinson at this meeting mentioned that the bank had looked at other options, he did not at the meeting on 23 January state that the Claimant had 'burned her bridges' (that was at the meeting on 29 January). The conversation between the Claimant and Mr Atkinson on 23 January came before the meeting at lunch time when the Respondent decided to proceed with 'plan b'. Further, even after this point if the Claimant had, at any time before an offer was actually made to Mr Legge on 28 January, gone to Mr White, or Mr Atkinson or Mr Lee and said that she wanted to reconsider, it is possible that the Respondent might have reverted to 'plan a'. In any event, there is no need for us to speculate because the answer to the claim made by the Claimant is that she did have an opportunity to reconsider if she had wished to take it, but she did not. She had been told in July 2019 (by Ms Ford) and in November 2019 (by Mr Atkinson) that salary was likely to be flat, and she had been given the actual offer by Mr White on 16 January, but turned it down on 23 January without taking the opportunity to make a counter-offer. She did that day have the 'heads up' from Mr Atkinson about the Respondent's 'plan b' which gave the opportunity to reconsider if she wished to. She did not.

230. Again, in the circumstances, while we accept that, given the speed at which it happened, the Claimant could reasonably regard the treatment as detrimental, there is no actual comparator for the Claimant and there is ample explanation for why the Respondent did what it did and no room in our judgment for any inference of discrimination. This claim fails.

The Respondent decided to make the Claimant redundant without attempting to negotiate a new package for her proposed role in Luxembourg despite her full registration status with CSSF (§62.1 POC)

231. It will be apparent from our conclusions above that this claim too must fail. It was reasonable for the Respondent in the circumstances not to make a

counter-offer (negotiating against itself) to try to get the Claimant to take the Luxembourg role notwithstanding the length of time she had been earmarked for it and the preparation that she had done. It was the Claimant who was unreasonable in simply refusing the role rather than seeking to negotiate by making a reasonable counter-offer. While we accept that the Claimant could nonetheless reasonably consider it to be a detriment that the Respondent did not apparently care enough about her personally to seek to persuade her to accept the role by making an increased offer, no actual male was treated more favourably and there is ample explanation for why the Respondent did what it did and no room in our judgment for any inference of discrimination. This claim fails.

Finding her an alternative position in London or elsewhere, having transferred and distributed her previous role to other employees (§62.2 POC).

232. The Claimant was provided by Ms Miles with a vacancy list, and was given (and took) the opportunity to seek other roles at the Respondent, but there were no suitable roles at this time. The Claimant has adduced no evidence that a man would have been treated differently in this situation, or any evidence from which that might be inferred (given the findings we have made about culture at the Respondent). The Claimant could not reasonably have considered the Respondent's approach to alternative employment to be detrimental in the circumstances, and even if it was, it was not less favourable treatment because of her sex. This claim fails.

Victimisation

The law

233. Under ss 27(1) and s 39(4)(c)/(d) EA 2010, the Tribunal must determine whether the Respondent has treated the Claimant unfavourably by subjecting her to a detriment because she did, or the Respondent believed she had done, or may do, a protected act.

234. A protected act includes (so far as relevant in this case) bringing proceedings under this Act or making an allegation (whether or not express) that a person has contravened this Act (ss 27(2)(a) and (c)). An act is not protected if it is done in bad faith (s 27(3)).

235. The law in relation to detriment, identifying the reason for the treatment and burden of proof is the same as for direct discrimination.

Conclusions

236. The Claimant relies on the following alleged protected acts about which we find as follows:-

237. First, raising concerns about Mr Lee's behaviour towards her on or around 9 November 2018 with Mr Atkinson. Our findings on this are at paragraph 73. This is not a protected act. It is Mr Atkinson who makes the allegation of discrimination, not the Claimant, and we find that she is not to be construed as 'adopting' his allegation in this WhatsApp exchange. We add in any event that we cannot see how this message is in any way linked to any of the detriments about which she complains. There is no evidence that the message was shared with anyone other than Mr Atkinson.

238. Secondly, raising concerns that her proposed salary for the combined roles of COO/CRO was unfair and unequal with Mr Atkinson in November 2019. Our findings on this are at paragraph 139. The Claimant did not in this meeting make a complaint or allegation of discrimination. This was not therefore a protected act.

239. The only protected act that the Claimant relies on is therefore her solicitor's letter before claim of 10 March 2020. It follows that all complaints of victimisation in relation to incidents that precede 10 March 2020 must fail. That leaves only the complaint about the bringing forward of her dismissal from 31 March 2020 to 20 March 2020. For the reasons set out at paragraph 196, we find that a significant part of the reason for this was because the Claimant had done that protected act. This claim therefore succeeds.

Limitation period

The law

240. Section 123 of the EA 2010 provides as follows*:*

> **123 Time limits**
> (1) Subject to section 140B, proceedings on a complaint within section 120 may not be brought after the end of—
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
> (b) such other period as the employment tribunal thinks just and equitable.
> (2) Proceedings may not be brought in reliance on section 121(1) after the end of—
> (a) the period of 6 months starting with the date of the act to which the proceedings relate, or
> (b) such other period as the employment tribunal thinks just and equitable.
> (3) For the purposes of this section—
> (a) conduct extending over a period is to be treated as done at the end of the period;
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
> (a) when P does an act inconsistent with doing it, or
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

241. Time limits are extended for ACAS Early Conciliation in accordance with s 140B as follows:

> **140B Extension of time limits to facilitate conciliation before institution of proceedings**
>
> (1) This section applies where a time limit is set by section 123(1)(a) or 129(3) or (4).
> . . ..
> (2) In this section—
> (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought,
> and
> (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.
> (3) In working out when the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.
> (4) If the time limit set by section 123(1)(a) or 129(3) or (4) would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.
> (5) The power conferred on the employment tribunal by subsection (1)(b) of section 123 to extend the time limit set by subsection (1)(a) of that section is exercisable in relation to that time limit as extended by this section.

242. The early conciliation period does not extend time where the time limit has already expired: *Pearce v Bank of America Merrill Lynch and ors* (UKEAT/0067/19/IA) at [23].

Conclusions

243. In this case, the Claimant has succeeded on only two matters:

    a. She was harassed by Ms Ford / Mr Atkinson when referred to by them in November 2019 as a *"ladette"* and *"one of the boys"*; and,
    b. She was victimised when the Respondent brought forward her termination date to 20 March 2020.

244. The victimisation claim is in time and succeeds.

245. The earlier act of harassment is brought over three months outside the primary time limit (including any ACAS extension), since anything occurring prior to 10 January 2020 is outside the primary time limit. It is, on the facts as we have ultimately found them to be, an isolated act. It is completely different in nature from the act of victimisation that we have found to be in time and the mere fact that Ms Ford was involved with both does not in our judgment provide the necessary link given the gap in time and the difference in the types of the discrimination involved. We have considered carefully whether it would be just and equitable to extend time. This point is finely balanced. Obviously, there has been a trial and there is thus no (further) prejudice to the Respondent in terms of having to respond to those allegations or incur

costs. The prejudice to the Claimant of not extending time at this stage is that she is denied a remedy for proven discrimination. On the other hand, the prejudice to the Respondent is that it may be required to provide a remedy for discrimination that is *prima facie* out of time. The protections against discrimination in the EA 2010 are important, and we must not cheapen them by refusing to extend time. However, we bear in mind that, so far as acts of discrimination are concerned, this incident of harassment is comparatively trivial and the amount of money that we would have been likely to award for it would also be comparatively trivial in the context of a case such as this, fought with teams of quality lawyers on both sides who will have run up costs far exceeding anything we might award by way of compensation for injury to feelings. This harassment is an example, in our judgment, of what we have termed 'loose language', by which we mean poorly chosen and stereotypical language that was well intentioned. Ms Ford and Mr Atkinson were trying to convey to the Claimant an idea about behaviour and to help her to prepare for a leadership role. They should have chosen their words more carefully, and by not doing so they caused offence, but this judgment is the record of that. The vast majority of the Claimant's claims have not succeeded and the Respondent has thus already suffered the prejudice of responding to a substantial case that has proved largely unsuccessful.

246. Balancing all those factors, we find that the Claimant has not persuaded us that it would be just and equitable to extend time for this act of harassment. The appropriate balance is in our judgment struck by her having this judgment on that issue, but missing out, because the claim was brought late, on a remedy for that.

Overall conclusion

247. The unanimous judgment of the Tribunal is:

(1) The Respondent contravened ss 27 and 39(4)(c) of the EA 2010 by victimising the Claimant when it dismissed her with immediate effect on 20 March 2021 rather than with effect from 31 March 2021. This claim is upheld.
(2) The Respondent contravened ss 26 and 40 of the EA 2010 by harassing the Claimant for reasons related to sex when in November 2019 it called her a *"ladette"* and *"one of the boys"*. However, this claim is brought outside the time limit in s 123(1) of the EA 2010 and is dismissed.
(3) The Respondent did not contravene ss 13 and 39(2)(d) of the EA 2010 by directly discriminating against the Claimant because of her sex, race, nationality, nationality or ethnic origin. These claims are dismissed.
(4) The Respondent did not otherwise contravene ss 26 and 40 of the EA 2010 by harassing the Claimant for reasons related to sex, race, nationality, nationality or ethnic origin. These claims are dismissed.
(5) The Respondent did not otherwise contravene ss 27 and 39(4)(d) of the EA 2010 by victimising the Claimant. These claims are dismissed.

248. In the light of our conclusions, two days will not be required for a Remedy Hearing, and we reduce the listing to **1 day** on Tuesday, 11 October 2022 **by video**.

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Employment Judge Stout

16 August 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

16/08/2022

FOR THE TRIBUNAL OFFICE