EMPLOYMENT TRIBUNALS

Claimant: Ms J Rajput

Respondent: Commerzbank AG

Heard at: London Central
(by Cloud Video Platform)

On: 17, 18, 19, 20, 23, 24, 25 and 26 May 2022 and 22 June 2022 (in chambers)

Before: Employment Judge Joffe
Mr R Baber
Mr D Kendall

Appearances
For the claimant: Ms E Banton, counsel
For the respondent: Mr G Mansfield, Queen's Counsel

JUDGMENT

1. The respondent directly discriminated against the claimant because of her sex, contrary to Section 13 of the Equality Act 2010 in that, in 2015:
   - Kevin Whittern was treated as the senior member of the team despite the claimant's position as Deputy Head of Markets Compliance;
   - Kevin Whittern was appointed as point person / acting Head of Markets Compliance despite the Claimant's position as Deputy Head of Markets Compliance;
   - the Claimant's application for the Head of Markets Compliance role was not fairly considered by Stephan Niermann.

2. The respondent harassed the claimant contrary to Section 26 of the Equality Act 2010 in that there were repeated denials by Stephan Niermann to the claimant that Kevin Whittern had been elevated to point person / acting Head of Markets Compliance.

3. It is just and equitable to extend time for the claimant's claims.

REASONS

Claims and issues

1. These claims have a long history. The claimant's claims were initially heard before Employment Judge Tayler and members in March 2018. By a Judgment dated 22 March 2018, the Tayler Tribunal upheld a number of the claimant's claims.

2. The respondent successfully appealed a number of the findings (Judgment of Soole J dated 28 June 2019) and a number of claims were remitted to the Employment Tribunal.

3. There were further appeals against case management decisions of Employment Judge Hodgson. On 10 November 2021, Choudhury P allowed the appeals and indicated which findings of fact made by the Tayler Tribunal were binding on this Tribunal.

4. The agreed list of the issues before this Tribunal is as follows:

   1. The parties are agreed that the following four allegations have been remitted to the Employment Tribunal.

   1.1 That Kevin Whittern was treated as the senior member of the team despite the Claimant's position as Deputy Head of Markets Compliance (direct sex discrimination) ("Allegation 1");

   1.2 That Kevin Whittern was appointed as point person / acting Head of Markets Compliance despite the Claimant's position as Deputy Head of Markets Compliance (direct sex discrimination) ("Allegation 2");

   1.3 That the Claimant's application for the Head of Markets Compliance role was not fairly considered by Stephan Niermann (direct sex discrimination) ("Allegation 3"); and

   1.4 That there were repeated denials by Stephan Niermann to the Claimant that Kevin Whittern had been elevated to point person / acting Head of Markets Compliance (harassment) ("Allegation 4").

   <u>Direct Sex Discrimination – s.13 Equality Act 2010 ("EqA")</u>

2. The Claimant's relevant characteristic is her sex.

Comparators

3. The comparator is Kevin Whittern.

Less favourable treatment

4. Did the following treatment occur:

4.1 That Kevin Whittern was treated as the senior member of the team despite the Claimant's position as Deputy Head of Markets Compliance;

4.2 That Kevin Whittern was appointed as point person / acting Head of Markets Compliance despite the Claimant's position as Deputy Head of Markets Compliance; and

4.3 That the Claimant's application for the Head of Markets Compliance role was not fairly considered by Stephan Niermann.

5. If so, was that treatment less favourable than that given to a man? Reason for less favourable treatment

6. If so, was any less favourable treatment because of the Claimant's sex?

7. Detriment

8. Did the less favourable treatment amount to a detriment?

Harassment – s.26 EqA

9. The relevant protected characteristic of the Claimant is her sex.

10. Were there were repeated denials by Stephan Niermann to the Claimant that Kevin Whittern had been elevated. Were those denials untrue?

11. If so, was this conduct unwanted?

12. If so, did this conduct have the purpose or effect of:

12.1 violating the Claimant's dignity; or

12.2 creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

[Issue not identified by the parties: was the conduct related to sex?]

Time Limits – s.123 EqA

13. Where any of the complaints made by the Claimant brought within the period of three months starting with the date of the act to which the complaint relates?

14. If not, were the complaints part of conduct extending over a period and, if so, what was the last act of that conduct extending over a period?

15. If any of the complaints made by the Claimant are out of time, has the Claimant proved that it is just and equitable that time should be extended?

Findings of fact

The hearing

5. We were provided with the following documents:
   - A primary bundle which consisted of 1246 pages electronically;
   - An additional bundle of 521 pages which contained the respondent's cross examination notes for a number of witnesses for the March 2018 hearing, some agreed extracts from those notes which had been used in the EAT hearing before Soole J and some disputed documents from the 2018 liability hearing bundle;
   - An agreed cast list from the 2018 hearing;
   - An agreed chronology from the 2018 hearing.

6. We read witness statements for and heard evidence from the following witnesses:

   For the claimant:

   - The claimant;
   - Ms J von Pickartz;

   For the respondent:

   - Mr S Walsh, head of central compliance;
   - Dr J James, at the material time, head of the quantitative solutions group;
   - Dr S Niermann, who held a variety of titles at the relevant time;
   - Ms J Burch, compliance advisor and assistant vice president;

   The witness statements we saw were largely from the initial proceedings and were redacted to remove now irrelevant material.

7. We also saw some witness statements from the original proceedings for witnesses who did not attend to give evidence:
   - Mr K Whittern, senior compliance adviser;
   - Mr J Dyos, head of markets compliance.

8. Dr Niermann had requested a German interpreter and at the outset of his evidence, the interpreter translated the questions put to Dr Niermann and the answers he gave. Dr Niermann's English was at a very high level, although we understood entirely why he was concerned to have an interpreter to give evidence in a language which was not his first language and avoid any misinterpretation. He eventually largely dispensed with the interpreter's services. It appeared that he felt he could convey his meaning in English

better than the interpreter's translations into English of his German answers did and the Tribunal formed the same impression.

Applications

9. There were applications to admit supplementary statements from Dr Niermann and the claimant. With some agreed redactions to the claimant's supplementary statement, ultimately these were admitted by agreement.

Findings of Tayler Tribunal

10. It is convenient to record here the passages from the Tayler Judgment which are binding on us. They are the findings of discrimination at paragraphs 190 and 192 of the Judgment which relate to the claimant's treatment by Mr Dyos.

11. There are also the findings that there was not discrimination in relation to the matters at paragraphs 186, 188, 189, 191, 193, 195 and 197 – 199. Many of these related to allegations about Mr Dyos which were not of central relevance to us. The most relevant findings for our purposes were:

186. We do not consider that there is a basis on which the Claimant should have been appointed automatically to the post of Head of Markets Compliance. We consider that open and fair recruitment should have been applied.

188. We do not consider that there is separate discrimination in Mr Niermann failing to provide feedback [on the appointment to the head of markets role]. We consider he did provide feedback of the limited nature that he stated that he wanted [a] candidate that could hit the ground running. We do not consider that this referred to an [sic] someone who would not be absent on maternity leave which is the basis upon which it was argued by the Claimant to be discriminatory. It really was a way of trying to explain that he wished someone to take over management of the department and deal with what was in his perception a toxic environment, ie an explanation of the conduct we have found discriminatory, rather than a further free standing act of discrimination. We do not consider it had the purpose or effect of creating a hostile environment etc and do not consider that it was an act of harassment.

199. We consider that the grievances were dealt with genuinely. Although we have reached a different conclusion about discrimination we accept that Dr James was seeking genuinely to reach proper conclusions on the grievance. She is not an equalities law specialist and was undertaking her first grievance. While she may not have tested some of the evidence more robustly we do not consider that this was because of the allegations of sex discrimination. We consider that she formed a genuine opinion to the best of her abilities and do not consider that a victimisation complaint is made out in respect of the grievance decision.

12. We did not take into account any other findings from the Tayler Judgment.

Approach to the evidence given at the previous hearing

13. We read and had regard to only the parts of the cross examination notes from the 2018 hearing which the parties directed us to.

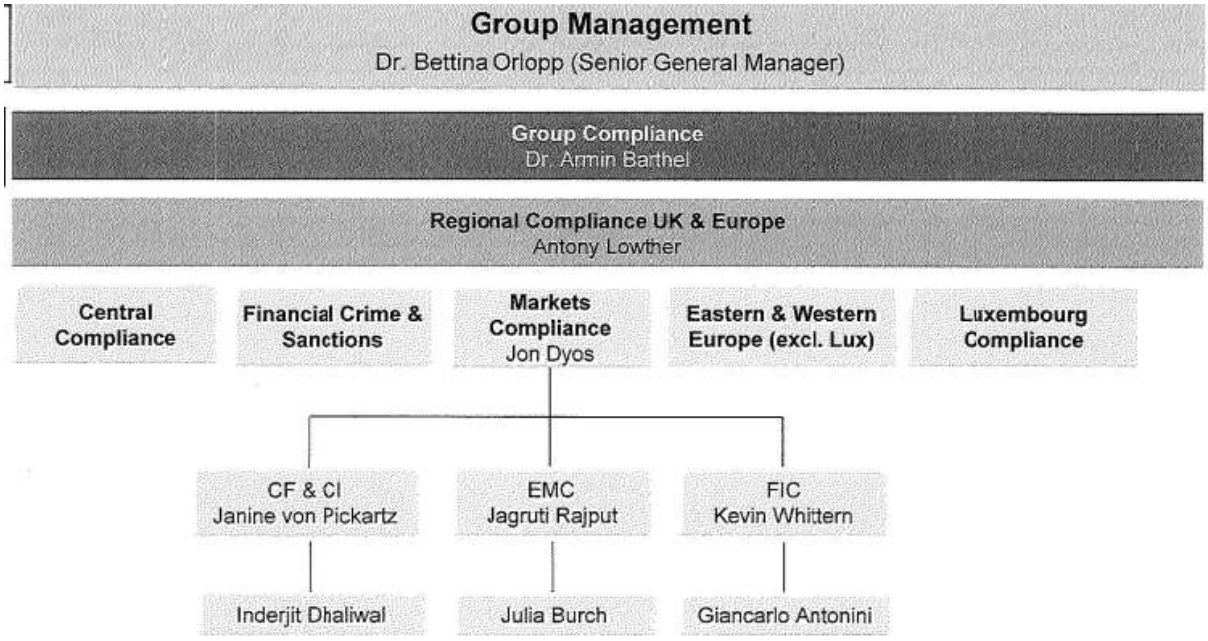
14. We gave them such weight as appeared to us to be appropriate given that we did not have the opportunity to see and hear the witnesses giving the evidence recorded.

Facts in the claim

Structure of the respondent's compliance department

15. The claimant was part of a team or department within the compliance department known as the markets team. Within the markets team, the areas covered were regulatory advice on:
    - Equity markets and commodities ('EMC)
    - Corporate finance ('CF')
    - Fixed income and currencies ('FIC').

16. We saw an organogram which reflected the position after Mr Dyos was appointed; we understood the basic structure of the compliance department for the earlier period also to be reflected in this organogram.



Evidence about women in management at the respondent

17. Both parties adduced some general evidence about the respondent's track record in respect of women in management positions. We set out that evidence here and consider whether it was useful to us in drawing inferences in our Conclusions below.

18. The claimant said that the respondent favoured men in management positions at level 3 and above. The claimant at relevant times was level 4 or ST (both of which are below level 3). The data showed that within the UK compliance department between 2012 and 2017, there had been between one and four level 3 positions, which had been occupied by male employees at all times. In Global compliance, there were 38 level 3 positions, of which 13% were occupied by female employees. At level 2, there were nine positions, of which one was occupied by a female employee.

19. Dr Niermann gave some evidence by way of his supplementary statement about his involvement in the promotion of female employees. A table was provided which showed the promotions / hires Dr Niermann had been involved in between 2011 and 2016. There were 16 women and 19 men in the table. Dr Niermann also gave some evidence about several other women whose promotions he had been involved with.

20. It was apparent that, particularly for the more junior positions in the table, Dr Niermann's involvement would have been signing off a decision made by another manager. For example, the appointment of Ms Burch was carried out by the claimant and her previous line manager, Mr Jooma. None of the

women in the table are above vice president level and the director level appointments were all of males.

Respondent's programmes about women in management

21. Dr James gave some evidence about various programmes or initiatives of the respondent. We were told that the respondent had diversity councils at global and regional levels and that in 2013 the London Regional Diversity Council was set up. In the London branch, there were a number of initiatives, including the London Women's Network, mentoring programmes, and 'Women in the City'.

22. Dr James gave evidence of diversity training workshops provided to managers in the years before she produced her statement, although not the detail of the training provided. She also referred us to various policies of the respondent which contained commitments to or goals in relation to equality and diversity. These included targets to increase the proportion of women in management.

23. The London Women's Network ran events, training sessions and seminars designed to provide support /role models for women employees. Women in the City was a yearly event aimed at providing information about the respondent to female undergraduates and recent graduates.

24. We were not presented with either anecdotal evidence or data about the effects of these programmes.

25. We saw an undated page from the respondent's intranet which was a question and answer session with a member of the respondent's HR Board about an initiative in relation to 'women and managerial positions'. It appeared to date from 2015 and indicated that the target had been to have 30% of managerial positions occupied by women. A the point when the Q and A was carried out, the percentage of women in these positions was 28.2, up from 23% in 2010.

Training on equal opportunities and other matters

26. So far as training was concerned, Dr James gave the evidence we have described.

27. Dr Niermann was, probably understandably given the lapse of time, vague about the training he had received from the respondent. He said that he had had training with the respondent on equal opportunities. In cross examination he was not familiar with the concept of unconscious bias. No evidence was

led by the respondent as to any training Dr Niermann had on recruitment procedures.

28. Mr Walsh said he had had lots of training when he started at the respondent but no specific training in recruitment after that stage. He said that he had had bias training but not specifically in relation to recruitment.

Policies and procedures

29. We saw a number of policies and procedures and refer to those parts of these documents which appeared to be relevant to our deliberations.

Recruitment policy:

30. The policy said, in respect of internal recruitment:

The Bank wishes to encourage internal progression to support career development, as such the Resourcing Specialist will advertise the position internally for a minimum period of 7 calendar days. Applications will be sent directly to the hiring manager to review. The manager is responsible for providing applicants with feedback.

31. The policy provided that the hiring manager was responsible for progressing the selection process but should keep the relevant HR business partner informed of progress. An interview assessment form was to be completed for each interview conducted and HR would need to interview candidates at the final round stage.

32. We saw an example of an interview assessment form used by Mr Jooma when first recruiting the claimant. That form required marking to take place against defined criteria; in other words it was a competency based interview assessment form. We include here the front page of the document we saw for the claimant's interview with Mr Jooma:

Competency Based Interview Assessment Form

This form should be used when conducting a Competency Based Assessment which measures the job specific competencies relevant to the role for which you are recruiting.

In order to conduct this type of assessment, you will require a list of the competencies relevant to the role which can be found in the

Candidate name	JAGRUTI RAJPUT
Role applied for	COMPLIANCE ADVISOR
Assessor	NASH JOOMA
Assessment date	19 JUNE 2012

Please complete the assessment form on page 2, using the classifications described below:

Classification	Score	Comment
Not Seen	1	Not seen.
Low	2	Very little evidence provided.
Medium	3	Inconsistent evidence provided.
High	4	Consistent evidence provided.
Very High	5	Overwhelming evidence provided.

Policy governance framework: deputy arrangements.

33. We saw a series of internal documents which described the role of deputies. The document provided that deputies were required in order to cover for the temporary absence of a postholder due to illness or annual leave. In the absence of the post holder the deputy would 'assume all assigned competences, including delegated competences'. Decisions of 'fundamental significance' were not to be taken by deputies. The document stated that: 'If the authorised person and/or their deputy changes, the deputy relationship expires.'

Other evidence about deputy arrangements

34. The claimant gave oral evidence as to her understanding of deputy arrangements. She said that one would know in practice who the deputy of an individual was and that was the person one went to if the post holder was away. She was appointed as Mr Jooma's deputy but in the 14 months she was in that position for Mr Jooma, he was not away much. The deputy would attend meetings that the post holder attended but would also, the claimant

said, get involved in more overarching projects. The deputy's profile would be raised.

35. Dr Niermann told us, and it was common ground, that the deputy position did not carry with it any change to salary or conditions. There was no disciplinary role for the deputy. Dr Niermann was accustomed to having deputies and being a deputy himself.

36. Mr Walsh was also aware of the deputy role and himself acted as a deputy, including for Dr Niermann and himself had a deputy. In his deputy role he would stand in for Dr Niermann at meetings.

37. Dr James, who was not in the compliance area but in research, was not accustomed to the role of deputy and had had to investigate the subject when she was investigating the claimant's grievance. She said that it was not a substantial role, not supervisory or disciplinary. She described the 'point person' role filled by Mr Whittern and which we discuss further below as somewhat more significant and more 'visible'.

38. We saw tables / a database that the respondent kept of roles and their deputies. It appears that some importance was placed on maintaining and updating these tables. Mr Walsh told us he was not aware of these tables and believed most people were not.

39. Our overall impression from the evidence we heard was that all the senior positions in compliance had deputy arrangements and these were of sufficient importance to the respondent for it to maintain a database about them. Nonetheless all the respondents' witnesses sought to downplay the importance of the deputy arrangements. It seemed to us that the deputy arrangement was of some importance; the deputy was the person who covered in the absence of a post holder and the fact that that person went to relevant meetings and was perceived as the deputy we thought inevitably increased the individual's 'visibility' and would have an effect on reputation / standing.

Events

40. On 1 November 2012, the claimant commenced employment with the respondent as a senior compliance adviser and vice president. Her area was EMC. Her manager was Mr N Jooma, head of markets.

41. On 4 November 2013: Ms von Pickartz was appointed to the equivalent role for corporate finance in the team.

42. On 3 March 2014, a special review called the PBS Review started, in which the claimant was heavily involved. This was relevant to claims the claimant withdrew in relation to whistleblowing. For the purposes of the issues we had to consider, it is relevant to note that this appears to have had an impact on the claimant's relationship with Mr Jooma and on her 2015 appraisal. There was a difference of opinion between the claimant and Mr Jooma about whether the claimant's work on the review had taken too long.

43. On 12 May 2014, the claimant was appointed deputy head of markets by Mr Jooma. Mr Jooma had been asked by human resources who his deputy would be after the departure of another staff member and he named the claimant. The respondent's database was updated with this information.

44. In September 2014, Mr K Whittern was appointed vice president for FIC in the markets team.

45. We saw a table for attendance at fortnightly London Compliance Management meetings ('LCMM') over the period. Mr Jooma, during his tenure, attended the majority of these. The claimant attended several after she was appointed deputy but from April 2015 most were attended by Mr Whittern until April 2016 when Mr Dyos, by then head of the markets team, attended most. The few he did not attend were attended by Mr Whittern.

Relationship with Mr Jooma / relations in the markets team

46. The events with which the Tribunal is concerned relate to the period after Mr Jooma left and was replaced by Dr Niermann, however the relations in the team and the relationship with Mr Jooma were referred to by both parties as playing a role in the matters which followed.

47. The claimant's evidence was in essence that Mr Jooma's behaviour created a toxic atmosphere in the team. She described him as behaving in a bullying way to one other member of staff in particular and said that members of staff had left because of Mr Jooma. We make clear that it was not necessary to the issues we had to decide for us to make findings as to the rights and wrongs of Mr Jooma's behaviour. We heard no evidence from Mr Jooma.

48. It is relevant to record that the claimant held the views about Mr Jooma described and that she shared them with Dr Niermann in January 2015.

49. The evidence of Ms von Pickartz was that she had been told Mr Jooma was difficult to work with prior to joining the respondent but she had been reassured and decided to accept employment with the respondent. Once she joined, she said that she found he was aggressive and bullying, and she lost her junior as a result of that behaviour. She said that she raised the issues but there was no documentary evidence before us of any complaints she may

have raised save for this reference in an email she sent to Ms Trovato in HR at the time:

Hi Nathalie,

Can we also please discuss this email trail.

I am finding it impossible to work with Nash and am actually scared to face him now or deal with him or interact with him in any way.

50. Dr Niermann's evidence as to Mr Jooma was that he was told by the claimant and Ms von Pickartz that Mr Jooma had micro managed them and given them unfair appraisals. He described their complaints in his witness statement as 'tendentious'.

51. In cross examination, Dr Niermann recalled discussions with the claimant about Mr Jooma's behaviour but did not recall being told that Mr Jooma had bullied a junior member of staff. He was not able to confirm that bullying by Mr Jooma had led to high turnover in the markets team as asserted by the claimant.

52. Dr Niermann gave evidence of Ms von Pickartz and the claimant 'playing politics'. He denied that he had a bias that women tended to play politics. When questioned, he said that the playing of politics consisted of:
- The complaints they had made about Mr Jooma;
- Trying to make other members of the team 'distrusting';
- Advocating for themselves. This was about what he described as 'almost daily' lobbying by the claimant and Ms von Pickartz for the head of markets position when this was advertised.

53. In relation to this last point, we noted that in his interview with Dr James for his grievance, Dr Niermann said:

I tried to stay out of these politics. There was competition between Janine and Jagruti regarding the Head role. I didn't see it but it was there. I took a view and made a decision regarding the Head role.

54. Given this statement made much closer to the time of the relevant events, we did not accept Dr Niermann's evidence about the 'almost daily' lobbying.

55. It was put to Dr Niermann that the tensions in the markets team were caused historically by Mr Jooma's behaviour and, after Dr Niermann took over the team, by Dr Niermann's appointment of Mr Whittern as 'point person'. He said that was not his impression.

56. We did not hear from Mr Whittern but we saw his witness statement and were referred to some notes of his cross examination at the 2018 hearing.

57. Mr Whittern's evidence was that before he started at the respondent, he had heard that Mr Jooma was a micro manager. He had discussions with Mr F

Clinch, then the assistant VP for FIC and the claimant and they suggested that there were issues with Mr Jooma. He spoke again with the recruitment consultant and then with Mr Jooma. Mr Jooma promised he would not micro manage Mr Whittern and Mr Whittern said that he did not do so and that he got on well with Mr Jooma during his tenure. He said that after he joined the claimant and Ms von Pickartz told him about their issues with Mr Jooma and he felt they were trying to recruit him to bypass Mr Jooma.

58. In cross examination at the 2018 hearing, Mr Whittern said he had had a good relationship with the claimant and Ms von Pickartz prior to being appointed point person. Dr Niermann was asked about that and said he could not comment on it as he had not been manager at the time.

59. Ms Burch was appointed as a compliance advisor in the markets team covering EMC on 7 April 2015. The claimant was senior to her and her supervisor. Ms Burch described the relationship between the claimant and Mr Jooma at that time as tense and uncomfortable and she said that the claimant was unhappy about an appraisal. .She said that she felt the claimant was trying to influence her view of Mr Jooma and that she felt uncomfortable about that.

60. We had to consider Ms Burch's evidence against a background of text messages with which we were provided which showed at least on their face, a convivial and supportive relationship involving a degree of frankness and intimacy between the claimant and Ms Burch. That was the claimant's evidence of the tenor of the relationship at the time. The claimant for example sent Ms Burch training materials by special delivery when Ms Burch was on sick leave. Both express some frank views about colleagues. The friendliness continues until the claimant's maternity leave. The claimant's own evidence was that the change in her relationship with Ms Burch only occurred when she returned from maternity leave.

61. We also had to bear in mind that Ms Burch's evidence at the 2018 hearing had in large part been adduced to contradict the claimant's case that Ms Burch had taken over the claimant's role whilst the claimant was on maternity leave. That was a claim which succeeded as maternity discrimination. This was a claim which had been ongoing over a long period during which the claimant and Ms Burch continued to work together. It seemed to us that Ms Burch's role in the proceedings was likely to have influenced her impressions of the claimant and the complexion she placed on the history.

62. On 11 February 2015, the claimant's 2015 appraisal document was produced by Mr Jooma. The claimant objected to the way in which the document was produced; she was not shown the draft at her appraisal meeting. She did not agree with some of Mr Jooma's comments.

63. On 9 March 2015, the claimant wrote to Mr Jooma rejecting the appraisal. There followed a series of emails which Dr Niermann was ultimately copied in to.

64. On 2 April 2015, Mr Jooma wrote to Ms Trovato, HR business partner, and Dr Niermann informing them that the claimant had declined her appraisal. The claimant had made comments in the respondent's appraisal recording system. He said he disagreed with the claimant's criticisms of her appraisal and suggested that the claimant's motivation was disappointment with her bonus. On advice, it appears that Mr Jooma put his own version of events around the appraisal on the record.

65. In an email of 20 May 2015 (by which time Mr Jooma had submitted his resignation), Mr Jooma wrote to Ms Trovato and Dr Niermann. He said amongst other things that he felt the claimant's mind was closed on the issue. He said:

Actually, as I am leaving anyway, you and Stephan [Dr Niermann] should seriously consider whether there is anything to gain for either Jagruti or Commerzbank in pursuing what is from Jagruti's perspective, a very thorny and uncomfortable situation. I expect it is highly demotivating for her if not Commerzbank career limiting.

66. We note that the appraisal was felt by Dr Niermann to be a source of the 'toxicity' he described in the team and it appeared to us that this correspondence must have had some effect on Dr Niermann's thinking. Overall the correspondence appeared to us to show the claimant seeking to pursue her concerns about her appraisal and Mr Jooma trying to shut down the discussion and suggesting that the claimant's pursuit of it was potentially 'career limiting'.

67. Continuing with the chronology, on 7 April 2015, Ms Burch joined the respondent as assistant VP for EMC.

68. Mr Jooma gave notice to terminate his employment as head of markets in April 2015. We had no real evidence as to why he chose to resign.

69. On 13 April 2015 Mr Whittern attended an LCMM meeting. That was the first time he had attended such a meeting on Mr Jooma's behalf. He attended another such meeting on 5 May 2015.

70. Between 12 and 31 May 2015, the head of markets role was advertised on the respondent's internal job board.

72. The requirements for the role were said to be:

- University degree or similar or adequate bank professional training

- Proven experience in Compliance and the Finance Industry

- Detailed knowledge and understanding of the local regulatory framework

- Understanding of regulatory frameworks within different jurisdictions (especially German) is an asset

- Broad knowledge and understanding of investment banking products

- Experience in dealing with regulators, an existing network is an asset

- Strong interpersonal and communication skills

- Experience of managing a team

73. Dr Niermann was leading the recruitment process. He said that the role was advertised internally and externally at what appeared to be the same time. He said the key criteria he was looking for from candidates were:

- strong leadership and management experience;

Sufficient experience across the different business areas to effectively manage the team.

74. Dr Niermann said that certainly by the time of the first round of interviews, he had come to the view that leadership and management skills were the most important criterion. This was because the team was divided and did not work well together. In part this appears to have been a function of the way the team was structured and organised and in part his perception that there were tensions between individuals in the team.

75. Between 10 June and 10 July 2015, Mr Whittern was working in Singapore and on 22 June 2015 the claimant attended an LCMM meeting.

76. On 23 June 2015, Ms K Bhalia, resourcing specialist, chased the claimant for her CV for the head of markets role. The claimant had discussed with Ms Bhalia applying for the role. The claimant sent her CV to Ms Bhalia on 24 June 2015.

77. Broadly, her CV shows that the claimant is educated to degree level, has various specialist professional qualification and a history of employment in compliance in banks.

78. On 3 July 2015, Dr Niermann first interviewed an external candidate for the head of markets role. That candidate was not considered appointable. At this point the three vice presidents in the team had all applied for the role. All were interviewed in June / July 2015 by Dr Niermann.

79. On 7 July 2015, the claimant had her interview with Dr Niermann for the head of markets role. No notes of the interview were produced nor was an interview assessment form. Asked about these documents, Dr Niermann said, ‘I can’t recall that now’ , ‘I can’t recall and can’t exclude them either’. We concluded

that no notes were taken and the designated form was not used for this or any other interviews held by Dr Niermann for this position.

80. Dr Niermann said that in terms of how decisions were made about the internal candidates, he had discussions with Mr D Rock, who also interviewed the internal candidates, and they came to conclusions in those discussions.

81. In the absence of notes, it was not clear to us how Dr Niermann would have remembered much about the interviews he had held by the time he spoke with Mr Rock some months later.

82. The claimant said her interview with Dr Niermann lasted ten to fifteen minutes; Dr Niermann could not recall how long the interview as and we accepted the claimant's evidence.

83. Dr Niermann did not carry out any sort of assessment against criteria or any scoring. Although he said that the respondent's policies had been followed and there was close coordination with HR, it was clear he had not followed the respondent's recruitment policy, in particular in relation to the use of the form, which would have guided him to carry out a competency based assessment.

84. On 10 July 2015, Mr Jooma left and Dr Niermann became interim head of markets. Dr Niermann had a portfolio of other roles at this time and was very busy; he was Head of Global Markets Compliance, Head of Regional compliance UK and Asia, Leader of Financial Crime Team and Money Laundering Reporting Officer.

85. Mr D Stumpf oversaw the markets team for a period of six weeks util mid to late August 2015.

86. The claimant gave evidence that after Mr Jooma left, Dr Niermann began to treat Mr Whittern as de facto head of markets, referring matters to him which would normally be matters for the head of markets and communicating with him more closely about work matters than he did with the claimant or Ms von Pickartz. The two would have weekly catch up meetings. The claimant felt offended by the perceived difference in treatment.

87. The claimant was questioned about the fact that Mr Stumpf was overseeing the team in the initial period after Mr Jooma's departure. The claimant said that Mr Stumpf told her in about July 2015 that Dr Niermann had appointed Mr Whittern as his 'point person'. She had a vague recollection of having a discussion with Mr Stumpf in which she questioned the arrangement and said that she was the deputy and asked why Mr Whittern was attending a particular meeting.

88. On 3 August 2015, Mr Whittern attended the LCMM.

89. On 12 August 2015, there was a team meeting at which Dr Niermann told the markets team that Mr Whittern had been appointed as point person for the team. It appeared from Ms von Pickartz's evidence that she had asked for a meeting to clarify Mr Whittern's role.

90. Both the claimant and Ms von Pickartz said that the matter was discussed right at the end of the meeting as they were about to leave the meeting.

91. The claimant said that Dr Niermann said at the meeting that the point person role was different from the deputy role and 'meant nothing'. She was taken aback and at the time and in the context did not raise the issue that she was the deputy to the head of markets.

92. Dr Niermann in his witness statement explained that he felt he needed someone to assist with overseeing the team because he was so stretched, given the portfolio of roles he was covering. He said that, given the politics in the team, he needed someone to report to him about the team and that Mr Jooma had felt Mr Whittern would be the most suitable person to take on such an interim role.

93. He said that he himself concluded Mr Whittern would be suitable; the role was to attend meetings, escalate matters where appropriate and communicate between Dr Niermann and the team. He said that it was not a formal role and it had no disciplinary powers or decision making powers for critical matters.

94. Dr Niermann's evidence was that he was not aware at the time that the claimant was deputy head of markets. Dr Niermann was asked in cross examination why he did not just appoint a deputy. He said that he was waiting for someone to come in as successor and that in the demanding context at that time of business / strategy change and US monitorship, he decided to stay close to the team. It was put to him that having a deputy did not mean not being close to team. He said 'that's right' but then said they already had deputies for each sub team (by which he meant EMC, FIC and CF and the three vice presidents) and so he did see the necessity to appoint a deputy overall.

95. Dr Niermann's explanation in his witness statement as to why he selected Mr Whittern for the role was that:

- Mr Whittern was an expert in FIC and at the time there was a lot of movement in the FIC business;
- He had the best managerial experience of the three, which he knew from conversations with Mr Whittern and Mr Jooma;
- He was the most available. Ms von Pickartz and the claimant were very busy.

96. He said that Mr Whittern 'the most innocuous' whereas the claimant and Ms von Pickartz were 'very divisive personalities'.

97. He said that it would not have made a difference to him if he had known that the claimant was the deputy and it did not make a difference that she had the greatest experience with the respondent. The claimant said that her greater knowledge of the respondent and the wider business would have been advantageous as she would have been better able to put information in context. She denied that there was a great deal of movement in FIC and said that she in any event had FIC experience.

98. Mr Whittern's evidence was that Dr Niermann did not explain to him why he had been chosen as point person.

99. On 3 September 2015, Dr Niermann was provided with CVs for further external candidates for the head of markets role.

100. During this period, the compliance department was involved in an efficiency and optimisation programme known as Team Excellence. Mr J Wohlers was responsible for organising the Team Excellence programme for the compliance department. There was a day-long department wide meeting on 21 September 2015. In the documents prepared for the meeting, Mr Whittern was described as acting head of markets. He gave the update for the markets team. We note that this would have conveyed to the compliance department at large that Mr Whittern was, in fact, acting head of markets.

101. When cross examined about this meeting and the document relating to it, Dr Niermann denied that Mr Whittern was the acting head, despite what the document said. It was put to him that the impression conveyed to the department would have been that Mr Whittern was acting head and at the same level as Mr Walsh and Mr Keay, who also presented at the meeting and were at L3 level. Dr Niermann nonetheless asserted that the role Mr Whittern was in was not profile building for him and expressed doubt as to whether the meetings were of any importance. Overall our impression was that he was seeking to downplay Mr Whittern's role in Team Excellence and the impression that his role would have conveyed to the rest of the department. Although he accepted that Mr Whittern attended Team Excellence meetings with himself, Mr Keay and Mr Walsh, he said it was just for the purpose of disseminating information not making decisions.

102. The claimant said that, during a Team Excellence meeting in this period, Mr Wohlers said that Dr Niermann had appointed Mr Whittern as acting head. The issue arose because Mr Whittern's role was contentious, particularly for the claimant and Ms von Pickartz.

103. The claimant said that when she raised the issue of Mr Whittern being named as acting head in the Team Excellence documents, Dr Niermann claimed he had not seen the presentation document previously and said that it was unfortunate it was presented to the entire compliance department.

104. The claimant spoke to Dr Niermann on 22 September 2015 about Mr Whittern's role. This meeting was prompted by the Team Excellence meeting the previous day and the fact that Mr Whittern had been described as acting head of markets. She pointed out that she was the deputy to the head of markets and asked if there was any point in her continuing to pursue her application for the head of markets role. She said that she felt undermined. Dr Niermann said he was not aware that there was a designated deputy to the head of markets.

105. Dr Niermann said to her that being first point of contact was an informal designation and was not deputy head or acting head. He did not explain why Mr Whittern had been appointed to that role.

106. Dr Niermann's evidence was that he could not recall if the claimant mentioned that she felt undermined. He denied he had not been transparent with the claimant'; he said that Mr Whittern was not the functional deputy; he said that with hindsight he could have communicated better. Asked if Mr Whittern was the most senior member of the team at this point he said he was 'not sure if he was most senior member'.

107. Ms Burch in her witness statement sought to explain the reference to Mr Whittern as acting head in the Team Excellence document as being just another term for 'point person', given that the Team Excellence organisers were not native English speakers. It would have been a 'translation issue'. We noted that structurally in the document, Mr Whittern was treated in the same way as other Level 3s / team heads, which did not appear to us to support Ms Burch's explanation that it was simply a translation issue.

108. Ms Burch also gave evidence that there was at some point a Team Excellence meeting at which there was game in which team members picked cards to represent members of the team. She said that the claimant picked a snake and that it was apparent this referred to Mr Whittern. She said that Mr Whittern was very uncomfortable and she herself was upset. Mr Whittern gave similar evidence in his witness statement.

109. The claimant's account of this game was that the purpose of the game was to select cards which represented good and bad leadership. She picked a snake for bad leadership and superman for good leadership. She did not intend to refer to Mr Whittern.

110. It was clear to us that there was tension in the team by this point and that Mr Whittern and Ms Burch thought the claimant was referring to Mr Whittern. It did not seem to us to be necessary to determine whether the claimant had been referring to Mr Whittern but in any event we were not persuaded that she was. It seemed to us more likely that the game was about selecting good and bad leadership qualities than it was about assigning descriptors to other actual team members, which seemed to have the potential to be counter productive and divisive and therefore an unlikely game to have been played.

111. On 25 September 2015, interviews with Mr D Rock were scheduled for internal candidates beginning the following week. The claimant had hers in early October 2015. No notes of these interviews were provided to the Tribunal.

112. Dr Niermann's evidence about his thoughts on recruitment for the head of markets role at this point were that lots of people within the respondent had been suggesting to him that the team needed a revamp. He was dubious about whether it was possible 'politically' for any internal candidate to successfully perform the role. Nonetheless he said that he considered the

internal candidates to the extent of progressing their applications to the stage of interviews with Mr Rock. He said that he could not recall Mr Rock's feedback in detail but recalled that he said that the claimant and Ms von Pickartz were good at what they were doing as they were subject matter experts. He had some reservations about Mr Whittern relating to a private disagreement which was not shared with Dr Niermann.

113. Dr Niermann said that the claimant and Ms von Pickartz revealed weaknesses in management and leadership capabilities. He said that although Mr Whittern had more management experience, he considered he did not have sufficient management experience for the role. He said that he was also looking for more cross product experience. Dr Niermann could not recall when he decided not to appoint any of the internal candidates.

114. Interviews with external candidates continued into November 2015. Mr Walsh and Ms Bhalia and Mr J Masalles, head of financial institutions marketing and private banking sales, all interviewed two external candidates: Mr Bolton and Mr Dyos.

115. Mr Walsh had a discussion with Dr Niermann about the appointment to the head of markets role. Dr Niermann told Mr Walsh that all three of the vice presidents in the team had applied for the role. Mr Walsh had not been asked to interview any of the internal candidates but he gave Dr Niermann his views He said that he thought that the claimant was the best candidate of the three. The claimant communicated with him in a clear and direct style and she had a good grasp of compliance issues generally. He did not feel that Mr Whittern communicated as well and found him slightly nervous; he felt that Ms von Pickartz was a divisive personality. Dr Niermann told Mr Walsh that he did not think any of the three internal candidates was suitable.

116. Mr Walsh confirmed in cross examination that he felt that the claimant was appointable to the head of markets role and that if Dr Niermann had agreed with that view the claimant would have been appointed. However, he also said that Mr Dyos had more management experience than the claimant and was the 'the more suitable person to immediately take charge of the team and assert the 'London view' in a confident and competent way with senior external clients.'

117. In terms of the interviews with external candidates he conducted, Mr Walsh did not make use of the form provided in the respondent's procedure. He said that the form did not fit with his way of working so he took his own contemporaneous notes. He felt that the forms dictated how an interview would go whereas he liked to take notes and then analyse them afterwards.

118. Mr Walsh said that he did not think about the fact that the two individuals he interviewed were both men; he did not know who had been on the longlist.

119. On 3 November 2015, Mr Walsh interviewed Mr Bolton. We saw his handwritten notes and an email summary of his views. He interviewed Mr Dyos on 6 November 2015 and sent his thoughts to Dr Niermann by email

that day. One of Mr Walsh's notes about Mr Bolton was: 'Appropriate banter. About Mr Dyos, he wrote, amongst other things:

JD was relaxed and confident, appropriate dress, banter etc.

120. In cross examination, Mr Walsh explained what he meant by 'banter':

'I mean social communication with candidate when first meet them – did you find the place ok etc, a way of assessing easy sociability of the candidate as well as putting them at ease.'

121. Asked by a Tribunal member whether he made allowances for background, he said that he made allowances for people who were nervous. Asked whether he made allowances for cultural differences in how people communicate, he said that he was looking for a colleague in the city; they wanted social banter to be at an appropriate level and not be culturally determined and for there to be an appropriate level of social discourse.

122. He did not use a scoring system although he wrote pluses and minuses in his notes as an informal scoring system. It was not a numeric system but he said that it worked for him. The interviews lasted about 45 minutes.

123. Mr Walsh said that he had had a lot of training when he joined the respondent but had been there for twenty years and had not had recent training in interviewing. He recalled having training over the years about bias but not specifically in relation to recruitment.

124. Mr Walsh recommended Mr Dyos for the role of head of markets.

125. On 13 November 2015, the claimant announced her pregnancy at work; her baby was expected in March 2016.

126. Some time in November 2015, there were discussions about updating the document which recorded the deputy arrangements for the compliance department.

127. On 27 November 2015, Dr Niermann emailed a Mr Uhlig saying ' could you please include Kevin Whittern in the Deputy Arrangement as functional Deputy for London Markets compliance.' He later that day wrote to Ms Schuez, asking her to update the deputy arrangements because it had been brought to his attention that day that the claimant still featured in the list 'although for me Kevin is the acting head'. In evidence, Dr Niermann said that he knew at this time the claimant was deputy on the respondent's chart. He said that charts were sometimes out of date. He said that he phrased the role as 'acting head' because he was under pressure; in fact he himself was the acting head. He said that he was pressured by Team Excellence. He said that he did not put much emphasis on the title but could see with hindsight that the communications raised questions.

128. On 2 December 2015, Dr Niermann wrote again to Mr Uhlig saying 'Please leave everything as it is. We are making good headway on Jooma's successor, so I wouldn't want to make any changes at this point in time.' Mr

Uhlig wrote back on 3 December 2015 to say that Mr Whittern had been included in the chart as deputy. Dr Niermann wrote back to ask him to 'rewind' and the chart was changed back again.

129. The claimant had met with Dr Niermann on 2 December 2015 to raise with him her concern that he continued to treat Mr Whittern as de facto head of markets. She said that Dr Niermann gave the impression of listening to and appreciating her concerns but that he did nothing to rectify or address the situation. A few days prior to that meeting, there had been a Team Excellence discussion at which Mr Wohlers had confirmed that Mr Whittern was acting head of markets and also deputy to the head of markets.

130 Mr Whittern also met with Dr Niermann on 2 December 2015. In his witness statement, he said that he explained the difficulties he was having performing the role of point person. They discussed the issues the team faced and the findings from Team Excellence. Mr Whittern said that Mr Wohlers and Dr Niermann felt there was a need for a stronger structure before the permanent head of markets joined, i.e. that there was need for a dedicated acting head. He said that at a subsequent team meeting, Dr Niermann confirmed that he was acting head.

131. Dr Niermann was asked in cross examination whether he had made Mr Whittern his deputy. He answered:

No I already said before it has to be seen in context. When I started in London I suddenly had to do four roles instead of two. I can understand when you say it like that, it can raise questions … basically Mr Whittern was always a point person and not a deputy.'

132. He outlined the difficult context again and said that the pressure on him led to him giving Mr Uhlig an overview which he needed for the US Monitor. He was under pressure to provide a name and a point person was not a regular role. He said of the email correspondence: 'if read like this, it creates the wrong impression for me. The deputy has more content than the point person.'

133. Asked about the meeting with the claimant on 2 December 2015, Dr Niermann could not recall details of that meeting. He said that he would not have stated something other than that Mr Whittern was the point person as Mr Whittern was nothing more than that. He changed the deputy designation back because it felt like it was not the right thing to do until they had an incoming head of markets. He appreciated how the claimant might have seen the situation but he had communicated Mr Whittern's role in the August 2015 meeting. He denied that his direction to Mr Uhlig on 2 December 2015 to not change the deputy arrangement in the chart was connected with the discussion he had had with the claimant that day.

134. On 3 December 2015, Mr Wohlers and Dr Niermann had a discussion subsequently recorded in an email by Mr Wohlers which Dr Niermann then amended. Mr Wohlers recorded that Dr Niermann had told him that Mr Whittern was acting head of markets and that he was going to change the

deputy arrangements chart to show Mr Whittern as acting head and the claimant as deputy. Dr Niermann amended the email account of Mr Wohlers to include the phrase 'point person' after 'acting head'. He added that acting head would mean disciplinary powers which was not the case.

135. It was clear that Dr Niermann did not want Mr Whittern to be referred to as 'acting head' in the respondent's records at this point.

136. When questioned by Dr James on 3 May 2017 for the purposes of the claimant's grievance, Mr Walsh said that Mr Whittern was appointed temporary head of markets pending the appointment of Mr Dyos.

137. On 10 December 2015, Mr Wohlers drew to Mr Whittern's attention the fact that the respondent's chart showed the claimant as deputy to the head of markets. Mr Whittern said that he was unfamiliar with deputy arrangements and confused as to what his own role was meant to be. He therefore emailed Dr Niermann and asked for clarification: 'My understanding from our team meeting and subsequent 1 to 1 on 2nd December was that my role was to be acting head until you have appointed a new head of Markets advisory, I have subsequently been told Jagruti is now officially Deputy to Head of Markets advisory and I am now not acting as Head of Markets Advisory?'

138. Dr Niermann replied asking who had told Mr Whittern that and saying that Mr Whittern was acting head and the claimant was deputy to the acting head.

139. In oral evidence, Dr Niermann explained this correspondence by saying that he was on holiday with his family at the time and he wrote it without sufficient care and it was wrong. It was a very pressurised situation. 'I was on vacation. I don't know why this came up again, I had been clear in August. I don't know why it came up again and again'. With hindsight he could see that he had caused confusion.

140 Mr Dyos accepted the role of head of markets on or around 18 December 2015. The claimant had been on mandatory time away for two weeks and returned on 23 December 2015.

141. The claimant commenced her maternity leave on 7 March 2016. Dr Niermann commented in his witness statement on the fact that the claimant had tried to dial into a team call on 14 March 2016. He said that Mr Dyos had told him that that claimant had tried to stay very closely involved with her work even at a very early stage of her maternity leave. He said that he 'put this down to Jagruti's unhealthy obsession with work which I had come to notice during the time I was covering the Team.' Asked about the 'unhealthy obsession' in evidence, he said that this was his observation. He had had conversations with the claimant where he encouraged her not to work long hours.

142. Mr Dyos commenced as head of markets on 4 April 2016.

143. The claimant had a feedback discussion with Dr Niermann on 2 June 2016 about why she had not been appointed to the role of head of markets

144. The claimant returned to work from maternity leave on 5 September 2016. Events which occurred after this point are largely the subject of undisturbed findings by the Tayler Tribunal.

145. We saw template documents filled in for the markets team in September 2016 as part of appraisals / a 'talent development discussion'. A comment made about the claimant in these documents was:

Jagruti is a long-standing member of the Advisory team and is very knowledgeable of equities; well respected by FO; is management her goal? Is a doer as well.

146. The documents also recorded views on when the individuals in the team would be ready for promotion to head of markets. For the claimant and Ms von Pickartz, the time period was said to be two to three years; for Mr Whittern, it was said to be one to two years. In a similar document from 2014, the claimant was said to be ready for promotion to head of department within two years.

147. On 30 March 2017, the claimant submitted a grievance. This covered many of the matters ultimately the subject of the claimant's Employment Tribunal proceedings.

148. Dr James was appointed to investigate the claimant's grievance. Amongst other investigations, she held a factfinding meeting with Dr Niermann on 24 April 2017. The notes of that meeting included the following passages:

JJ: On the 12 August 2016 you formally announced that Kevin Whittern was to be appointed the first point of contact within Markets, why was this as Kevin was relatively new?

SN: I deemed Kevin Whittern to be more Senior, not necessarily in respect of the business lines he looked after but because of his management skills, he may not have necessarily have had the most functional or product knowledge but in my opinion he had the best management skills and was the better 'point' person

…

JJ: Do you recall JR saying to you that she was the Deputy and that she was unhappy?

SN: Yes. I remember a conversation that she was disappointed. I explained to her that because of the problems and friction within the team I decided it was better to appoint somebody relatively new. I don't know what her arrangement with Nawshad had been.

JJ: Did you say to her that she was no longer Deputy Head?

SN: I'm not sure…

JJ: Did you mention this appointment to HR; Was it a formal designation or formal agreement?

SN: No. it was an informal appointment within our team, it wasn't an official role, it would be that we would just have a 'point' person

149. A formal grievance meeting with the claimant was held on 26 April 2017.

150. On 3 May 2017 Dr James had a fact finding meeting with Mr Walsh. At that meeting, Mr Walsh confirmed that the claimant had been Mr Jooma's deputy and that Mr Whittern had been appointed acting head by Dr Niermann pending the appointment of Mr Dyos.

151. On 4 May 2017, Dr James held a further fact finding meeting with Dr Niermann. The notes included the following:

JJ: Jagruti says that Joerg Wohlers said that the Deputy designation had changed to Kevin Whittern but then changed back. Can you tell us more about this?

SN: There was a discussion put forward by the Team. Kevin Whitten was mentioned more than once as the Deputy. I am not exactly sure what the basis is for this, there was a clear understanding that Kevin was Deputy, as was clarified in the Team Excellence meeting.

JJ: What is the official role of a Deputy within Compliance?

SN: I don't know what the official description would be but it is the 'go to' person or the 'point of contact person if the Head isn't around. I have a Deputy here in Frankfurt, it is more of an operational role, the Deputy would not make decisions.

JJ: Jagruti mentioned on a number of occasions her being Deputy. Did you formally change to Kevin and inform Jagruti that she was no longer Deputy?

SN: No there was no official communication. There was a discussion but I can't recall when it took place.

JJ: To clarify, it was made clear that Kevin was Deputy?

SN: Yes. I'm not sure of the conversation exactly.

JJ: You don't remember Jagruti telling you she was Deputy?

SN: There might have been a conversation. The decision was clear to me that Kevin was Deputy.

JJ: Janine von Pickartz says that Eileen Pengilley told her that you told Eileen that Jagruti was to stop contacting the Bank or she would have her access cut. Is this true? If so, what this MTA related?

SN: No, this was not the case at all. I tried to stay out of these politics. There was competition between Janine and Jagruti regarding the Head role. I didn't

see it but it was there. I took a view and made a decision regarding the Head role.

152. On 5 June 2017, Dr James produced the grievance outcome. This included the following findings:

Findings

Initially it is useful to understand the role of Compliance Deputy, how a Deputy is appointed, and how they may cease to be a Deputy. These policies are defined in the internal brochure Policy Governance Framework. One may summarise the role of a Deputy as might be expected; they are empowered to take their manager's place in certain capacities, in the absence of their manager. The Framework document also stipulates that the records of managers and their deputies should be kept up to date.

In section 12.3.4.3 it is stated

"If the authorised person and/or their deputy changes, the deputy relationship expires'

Thus, when Nash Jooma departed, Jagruti's Deputy status terminated, as she was Deputy specifically to Nash, not to the team in general. It would have been courteous to inform her of this, as much of her subsequent unhappiness stemmed from her perception that she was being unfairly downgraded.

Did Nash unfairly downgrade her, even when she was indeed formally his Deputy? I have looked for evidence for this, though the elapsed time since the events makes it difficult. In an out of office email in April 2015, Nash asks folk to direct enquiries to the team email, not to Jagruti, but that could have been purely for efficiency. An Important and regular meeting, usually attended by the head of the team, is the Compliance Management Meeting, which is held twice each month. If the head cannot attend he or she will usually sent a representative.

Jagruti states that until 9th March, she had attended any meetings which Nash could not go to, but after that, he delegated this role to Kevin Whittern, a relatively new joiner to the team.

The records for this are kept and so we may see who attended. Usually, when Nash was at the Bank, he attended. After Jagruti was made Deputy, she attended two of these meetings, on 16th June 2014 and 11th August 2014, in Nash's absence. On 13th April 2015 and 1st May 2015, Kevin Whittern attended, and on 22nd June 2015 Jagruti attended once more. On 10"" July 2015 Nash left the bank. It is difficult to say definitively that this shows that Kevin was being preferred over her, and that she was being downgraded as Deputy, from this timing. While Kevin attended two meetings in 2015 prior to Nash's departure, Jagruti attended one, and in the Job Description of Kevin, Jagruti and the third senior person, Janine von Pickartz, they are all required

to 'Deputise for the Head of Markets Advisory Compliance as required'. I do not find strong evidence that Nash 'downgraded' Jagruti's status as his Deputy in the few months between the PBS review and his departure.

We now come to Stephan Niermann's tenure as Head of the team. Prior to that he had been Nash Jooma's line manager, and managed other Compliance teams as well. He took over Nash's job although he retained his other responsibilities. This was a temporary measure until a replacement for Nash could be found.

In Nash's handover process to Stephan, Nash did not mention that Jagruti was his Deputy. Stephan did not make enquiries about who was Deputy, but he decided after meeting with the team and having discussions with them that Kevin was to be the 'point person' or "first point of contact'. This was not a formal Deputy appointment in that he did not mail Group Compliance Resource Management to let them know that Kevin had been appointed to Deputy. He stated that it was an informal appointment within the team. However, there is some confusion in that Jagruti emailed to say that she had been told by another colleague that Kevin had temporarily been appointed to Deputy, but then she had been reinstated. I can find no record of this happening and Stephan does not recall.

We now come to a situation where Jagruti states that she several times told Stephan that she was Deputy, and that he did not address her concerns. In my interviews with Stephan he said that he did not recall details but remembered a conversation where she was disappointed that Kevin would be more senior within the team. He was not sure if she had said that she was team Deputy.

It is however clear that Kevin was at this stage being treated as the senior of the three (Jagruti, Janine and Kevin) officers in the team. The records of the attendance at the Compliance Management Meeting show that Kevin attended 15 out of the next 16 meetings, with Jagruti attending only one. As Stephan was managing this team in addition to other responsibilities while a new head was sought it is not surprising that he delegated this meeting, but he did delegate preferentially to Kevin.

We will deal with Jagruti's separate statement that Kevin was preferred and elevated unfairly because he was a man in the next section. The evidence is clear that in regard to the Deputy role, Kevin was certainly being treated more as team Deputy.

Jagruti was clearly unaware, and had not been informed, that her role as Deputy had terminated with Nash's departure. She could have discovered this in the Policy Governance Framework if she had known where to look, but she was not directed to it. She would have been reinforced in her belief that she was still team Deputy because the official database of Deputies (an internal spreadsheet, available on the internal web) was not updated; it showed and indeed still (as of May 2017) shows her as Deputy.

Stephan was aware that as team manager he was entitled to choose his own delegates and seniors. His choice of Kevin, and elevation of him within the team structure, was within policy. But it was poorly done. Jagruti should have been immediately told that her designation as Deputy expired with Nash's departure, and that the next choice was Kevin and not herself. That this was not done clearly, and that the internal database was left unchanged, can only have added to her sense of mistreatment.

Moreover, Stephan should have ensured that there was a formal Deputy for the team, even though he was only managing them until a replacement head could be appointed. He did not do this; Kevin's status was informal, and Stephan did not check who was recorded as the Deputy in the internal database.

…

While this issue overlaps to an extent with the previous issue of team Deputy, I am covering here Jagruti's specific statement that Kevin was unfairly elevated in the team because he was a man, and that he had an unfair advantage over Jagruti and Janine in the application process for Head of Markets. It does appear to be the case that Kevin was being treated as the senior person on the team. Under Stephan Niermann, Kevin was made into the 'point person', he was sent to Singapore on a business trip, and he attended many more of the Compliance Management meetings. At a Team Excellence meeting on 21 Sep 2015, Kevin Whittern was noted as Acting Head for their team.

After Jon Dyos was appointed. Jagruti was also unhappy that Kevin was asked to add Commodities to his development plan for his 2017 Target Agreement, as this was part of her own remit. Jon apologised and amended all three appraisals to broaden their remits, to improve general knowledge. There are some other meetings where she feels she should have been included but Kevin was chosen instead.

There is little doubt that at this time Kevin was seen as the senior of the three Compliance officers in the team.

But, as was stated in the previous point, the team managers are absolutely entitled to appoint their own deputies and delegate as they see fit. Both Stephan and Jon have stated that they felt Kevin was the best person for the job, which is a judgement, as managers, which they are entitled to make.

I can find no evidence at all that Kevin's gender conferred an advantage upon him. It is true that he was the only man in the three person team, and that he was informally the senior of the three, but that hardly constitutes evidence of sexism.

I can also find no evidence that Kevin was unfairly preferred for the job of Team Head, not least because he did not get the job. Jon Dyos was appointed.

153. So far as Dr James' investigation into the claimant's complaint about the appointment to the head of markets role was concerned, Dr James looked at Mr Dyos' CV and spoke to Dr Niermann. She did not look at any interview notes or seek to discover why the internal candidates were rejected.

154. She concluded on that issue that Mr Dyos had greater management experience than the internal candidates for the role. She concluded that the claimant had not been unfairly overlooked for the role.

155. On 10 June 2017, the claimant was sent the grievance outcome.

156. The claimant submitted her claim to the Tribunal on 12 September 2017.

157. We saw Mr Whittern's appraisal for 2016. This included the following: 'has also temporarily covered the role of head of markets advisory prior to the arrival of Jon Dyos and continues to deputise when Jon is out of the office.' Mr Walsh was asked about the appraisal, which he had not seen before; he agreed with the proposition that it demonstrated that the acting head position was 'something of substance'. Dr Niermann dd not know who had filled in the appraisal and thought it was Mr Dyos.

Law

Direct discrimination

158. In a direct discrimination case, where the treatment of which the claimant complains is not overtly because of the protected characteristic, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of mental processes of the individual responsible; see for example the decision of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884 at paragraphs 31 to 37 and the authorities there discussed. The protected characteristic need not be the main reason for the treatment, so long as it is an 'effective cause': O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor [1996] IRLR 372.

159. This exercise must be approached in accordance with the burden of proof provisions applying to Equality Act claims. This is found in section 136: "(2) if there are facts from which the Court could decide, in the absence of any other explanation, that person (A) contravened the provision concerned, the Court must hold that the contravention occurred. (3) but subsection (2) does not apply if A shows that A did not contravene the provision."

160. Guidelines were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof (in the context of cases under the then Sex Discrimination Act 1975). They are as follows:

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

161. We bear in mind the guidance of Lord Justice Mummery in Madarassy, where he stated: 'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.' The 'something more' need not be a great deal; in some instances it may be furnished by the context in which the discriminatory act has allegedly occurred: Deman v Commission for Equality and Human Rights and ors 2010 EWCA Civ 1279, CA.

162. The tribunal cannot take into account the respondent's explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

163. The distinction between explanations and the facts adduced which may form part of those explanations is not a watertight division: *Laing v Manchester City Council and anor [2006] ICR 1519, EAT.* The fact that inconsistent explanations are given for conduct may be taken into account in considering whether the burden has shifted; the substance and quality of those explanations are taken into account at the second stage: Veolia Environmental Services UK v Gumbs EAT 0487/12.

164. In *Chief Constable of Kent Constabulary v Bowler EAT 0214/16,* Mrs Justice Simler said: 'It is critical in discrimination cases that tribunals avoid a mechanistic approach to the drawing of inferences, which is simply part of the fact-finding process. All explanations identified in the evidence that might realistically explain the reason for the treatment by the alleged discriminator should be considered. These may be explanations relied on by the alleged discriminator, if accepted as genuine by a tribunal; or they may be explanations that arise from a tribunal's own findings.'

165. Although unreasonable treatment without more will not cause the burden of proof to shift (Glasgow City Council v Zafar [1998] ICR 120, HL), unexplained unreasonable treatment may: Bahl v Law Society [2003] IRLR 640, EAT.

166. We remind ourselves that it is important not to approach the burden of proof in a mechanistic way and that our focus must be on whether we can properly and fairly infer discrimination: Laing v Manchester City Council and anor [2006] ICR 1519, EAT. If we can make clear positive findings as to an employer's motivation, we need not revert to the burden of proof at all: Martin v Devonshires Solicitors [2011] ICR 352, EAT.

167. We bore in mind when assessing different accounts of the same events and any inferences about credibility which we might draw, that memory is fluid, memories are rewritten when recalled and the process of reducing them to a witness statement further distorts memory and crystallises the version presented in the witness statement, a version which may have been influenced by reading documents and discussing the events with others. We bore in mind the guidance provided in case law that we should base factual findings on inferences drawn from the documents and known or probable facts where possible. Confidence in recollection is not an indicator of the truth of that recollection. We had regard to the guidance given by Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm).

Harassment

168. Under s 26 Equality Act 2010, a person harasses a claimant if he or she engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of (i) violating the claimant's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In deciding whether conduct has such an effect, each of the following must be taken into account: (a) the claimant's perception; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.

169. By virtue of s 212, conduct which amounts to harassment cannot also be direct discrimination under s 13.

170. In Richmond Pharmacology Ltd v Dhaliwal [2012] IRLR 336, EAT, Underhill J gave this guidance in relation to harassment in the context of a race harassment claim:

> 'an employer should not be held liable merely because his conduct has had the effect of producing a proscribed consequence. It should be reasonable that that consequence has occurred. The claimant must have felt, or perceived, her dignity to have been violated or an adverse

environment to have been created, but the tribunal is required to consider whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so……..Not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers and tribunals are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other discriminatory grounds) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'

171. An 'environment' may be created by a single incident, provided the effects are of sufficient duration: Weeks v Newham College of Further Education EAT 0630/11.

Time limits

172. Under s 123 Equality Act 2010, discrimination complaints should be presented to the Tribunal within three months of the act complained of (subject to the extension of time for Early Conciliation contained in s 140B) or such other period as the Tribunal considers just and equitable. The onus is on a claimant to convince the tribunal that it is just and equitable to extend the time limit: Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA.

173. Under s 123(3), conduct extending over a period is to be treated as done at the end of the period.

Submissions

174. We received written submissions and detailed oral submissions from both parties and we have considered these with care. We refer to them in our Conclusions only insofar as is necessary to explain our reasoning.

Conclusions

Credibility

175. The respondent made a number of submission about the claimant's credibility:

- That she was unreliable about the chronology in her original witness statement, particularly with respect to events around the application for the head of markets role. We did not conclude that there was any material inconsistency.
- So far as more general attacks on the claimant's credibility were concerned, and in particular a suggestion that her evidence had grown over time, we had to bear in mind that the hearing before us focussed on four issues only, as compared with the broader spread of issues at the 2018 hearing. The claimant has had many years to think about events which took place a long time ago. She will have been asked different questions in cross examination on this occasion. Inevitably she will not have given exactly the same evidence at two different hearings but there was nothing which caused the Tribunal to conclude she had consciously invented any evidence or that she was more unreliable than any other person recalling events at this distance in time.
- Two examples were raised by the respondent of occasions when the claimant was said to have given evidence about matters she did not actually know about. Both concerned assumptions that she had made (that Mr Whittern would have had feedback for his application for the head of markets role and that Mr Whittern would have had regular one-to-one meetings with Team Excellence). Neither assumption was entirely unreasonable nor sufficient in itself or in combination with other matters to undermine the claimant's credibility materially.
- It was suggested that the claimant was too quick to assume discrimination, for example when Mr Dyos was appointed and she did not know what his qualifications were. We did not consider that there was anything that undermined the claimant's credibility in this respect. The claimant by this stage had had reason to be concerned about matters such as the point person role and her own minimal interview with Dr Niermann for the head of markets role. That she had a suspicion of discrimination in a state of imperfect information does not undermine her credibility.
- The respondent said that claimant's credibility was damaged by making and the abandoning whistleblowing claims. Again, we considered that in a state of imperfect information and confronted with short Tribunal time limits, the claimant made what seemed to her a possible claim on the facts she was aware of and then very properly did not pursue that claim to trial as the evidence unfolded.

176. The respondent was also critical of the evidence of Ms von Pickartz. Like that of all the witnesses, it was greatly affected by the passage of time. We considered that she was to some degree using her evidence as an opportunity to air her unhappiness with Mr Jooma in particular, but we did not consider that that undermined the rest of her evidence.

177. Given how old the matters before us were and having regard to the guidance in Gestmin and other cases, we placed most reliance of contemporaneous documents. The greatest tension between what was contained in documents and what was now asserted in oral evidence was with respect to Dr Niermann's evidence, particularly in relation to the issue of what role Mr Whittern was occupying in late 2015.

Less favourable treatment

Issue: Did the following treatment occur:

4.1 That Kevin Whittern was treated as the senior member of the team despite the Claimant's position as Deputy Head of Markets Compliance;

178. We considered that there was good evidence to show that the role of deputy had some significance in the respondent for reasons we have outlined above, including the concern about keeping accurate records of who deputies were. Once Mr Jooma had left and Dr Niermann was covering the head of markets role amongst a number of other roles, the deputy role assumed greater importance. Dr Niermann's evidence to the Tribunal was in effect that he very much needed someone on the ground in the markets team to act as his eyes and ears. Many more of the LCMM meetings were being attended by the deputy than would have been the case when Mr Jooma was in post.

179. Dr Niermann said he did not know that the claimant was already deputy, but in circumstances where he was well aware that deputy arrangements were usual, on his own account, he made no enquiry. He did not suggest that this was because he would have assumed, as Dr James later concluded, that any such arrangement would have lapsed.

180. We considered that it was a fair characterisation of the situation that Mr Whittern was treated as the senior member of the team. This corresponded both with the evidence the claimant and Ms Von Pickartz gave about how Mr Whittern was treated and also with the evidence of his attendance at the LCMM meetings and with the way Mr Whittern was characterised by Team Excellence. In that context, he was not only described as acting head of markets, he presented to the meeting in that role. It corresponded with what Dr James found and with what Dr Niermann in fact told Dr James:

JJ: What is the official role of a Deputy within Compliance?

SN: I don't know what the official description would be but it is the 'go to' person or the 'point of contact person if the Head isn't around. I have a Deputy here in Frankfurt, it is more of an operational role, the Deputy would not make decisions.

JJ: To clarify, it was made clear that Kevin was Deputy?

SN: Yes. I'm not sure of the conversation exactly.

JJ: You don't remember Jagruti telling you she was Deputy?

SN: There might have been a conversation. The decision was clear to me that Kevin was Deputy.

It also corresponded with Mr Walsh's understanding at the time.

181. It was also clear to us that Mr Whittern accrued some of the benefits which might be expected from having undertaken a more senior post – in terms of his appraisal and his talent assessment documents, benefits which the claimant did not receive. The assessment as to when the claimant would be ready for promotion lengthened between 2014 and 2016. The role Mr Whittern was playing was 'something of substance', as Mr Walsh accepted.

182. Ultimately and having regarded to what seemed to us to be downplaying of the significance of the deputy role by Dr Niermann and others which seemed to us to be inconsistent with other evidence, we concluded that the role of 'point person' was created to get round the existing system of deputies in circumstances where Dr Niermann wanted to appoint Mr Whittern to the role of his stand-in / second in command, whatever title it was given. Dr Niermann was either aware that the claimant was the deputy or had not troubled to find out who the deputy was.

183. Dr Niermann did not give any coherent evidence as to why he did not just have a deputy rather than creating a 'point person' role.

184. Was this less favourable treatment of the claimant than Mr Whittern? We concluded that it was. It was clear and understandable that even if these opportunities did not carry with them any more money or a change to terms and conditions, they were considered to be profile raising and might influence a person's onward career progression. There was clearly a detriment; a reasonable employee in the claimant's position would feel she was put at a disadvantage.

185. We were satisfied that Mr Whittern and the claimant were in materially the same circumstances – as vice presidents in the same team - and that Mr Whittern was an actual comparator.

186. Were there facts from which we could reasonably conclude that the difference in treatment was due to sex? We considered the following matters in particular:

- The fact that Dr Niermann in evidence sought to suggest that Mr Whittern was not in a more senior role in the face of contemporaneous documents and the evidence of not only the claimant and Ms von Pickartz but also Dr James and Mr Walsh to the contrary;

- The efforts of Dr Niermann and others to downplay the role of deputy;
- The fact that the claimant was the deputy to Mr Jooma and had been with the respondent the longest of the vice presidents in the team. Mr Whittern had been with the respondent the shortest time. Out of three candidates, the man was appointed despite having the shortest service and despite a woman occupying a role the respondent recognised ie the deputy role;
- Inconsistencies in Dr Niermann's account of whether Mr Whittern was acting head (the related issue we consider below).

187. We considered that these factors in particular caused the burden to shift. Looking at Dr Niermann's explanations, did the respondent prove that sex did not play a material role?

188. We did not consider that it had. Although Dr Niermann gave a number of reasons for appointing Mr Whittern to the point person role, none of Dr Niermann's reasons were evidenced in writing at the time. The claimant challenged the suggestion that there were particular movements in FIC at the time and said that in any event she had FIC experience. We had no independent evidence to support either the claimant's position or that of Dr Niermann on this issue but we remind ourselves that it is for the respondent to prove that there was no discrimination and it was difficult for the Tribunal to be persuaded of Dr Niermann's reasons in the absence of any contemporaneous record or apparent articulation of these reasons.

189. Dr Niermann referred to the busyness of the claimant and Ms von Pickartz as a reason, but accepted in cross examination he had not discussed with them how busy they were. He said that Mr Whittern had the greatest managerial experience but his own evidence about the point person role was that it had no managerial content; it was a communication role, so this did not make sense as a reason.

190. Dr Niermann also described Mr Whittern as 'innocuous' and the claimant and Ms von Pickartz as very divisive personalities. He said that was another reason why he appointed Mr Whittern. Did we accept that Dr Niermann genuinely believed the claimant was contributing to a toxic atmosphere in the team, that that view was untainted by sex and that it was the real reason for this and other decisions?

191. Part of this perception of Dr Niermann was said to have arisen from the claimant's relationship with Mr Jooma, as to which he seems to have primarily been aware of the appraisal issue. We note that Dr Niermann appears to have concluded that the issue with Mr Jooma arose from fault on the claimant's side. He had not investigated the issue at all. Similarly Ms von Pickartz is seen to be a problem, in circumstances where there was no investigation of the matters she had raised relating to Mr Jooma.

192. In isolation, we might have concluded that Dr Niermann had a tendency to believe the more senior person to be in the right (in this case Mr Jooma), but, taken together with other matters, we concluded that we were not satisfied that the claimant and Ms von Pickartz's sex had not played a role in Dr Niermann's perception that they were the problem and not Mr Jooma.

193. These matters included the fact that once Mr Jooma was out of the way, even on Mr Whittern's evidence, there was not an ongoing issue in the team until Dr Niermann appointed Mr Whittern as point person. Also of significance to us was what we found to be the incorrect assertion by Dr Niermann in evidence that Ms von Pickartz and the claimant were lobbying Dr Niermann daily for the head of markets role.

194. We also took into account, although it was of less significance, Dr Niermann's description of the claimant as having an unhealthy obsession with work. This seemed to arise at least in part from the claimant attending a meeting early in maternity leave. We heard no evidence that he considered any man to have such an 'unhealthy obsession' based on working long hours, which he said was what initially caused him to form this view of the claimant.

195. It was also relevant to us that we did not believe Dr Niermann's attempted explanation for the documents in which he clearly described Mr Whittern as 'acting head' His lack of credibility on that issue affected our assessment of whether his explanations were a true and complete reason for appointing Mr Whittern. It was also relevant to our findings that whilst assuring Mr Whittern that he was acting head in late November / early December 2015, Dr Niermann was at the same time seeking to persuade the claimant he was simply 'point person'.

196. Given all of those matters, the respondent did not satisfy us that Dr Niermann's decision making was untainted by the claimant's sex. We upheld this claim.

Issue: Did the following treatment occur:

4.2 That Kevin Whittern was appointed as point person / acting Head of Markets Compliance despite the Claimant's position as Deputy Head of Markets Compliance;

197. This issue is not sensibly divisible from the previous issue and most of the same reasoning applies. As a matter of fact, Mr Whittern was appointed as 'point person'. He was told he was acting head of markets within a week of Dr Niermann saying to Mr Wohlers that he was not acting head. It is clear from the evidence we have summarised above that not only was he point person, he was also said to be acting head and perceived as such by others including Mr Walsh. He received credit for being acting head in his 2016 appraisal.

198. Again, Mr Whittern was an appropriate comparator and, for reasons we have described above, this was less favourable treatment of the claimant. Although the role did not carry monetary benefits or disciplinary powers, it was clear that it created tangible benefits in terms of perception within the respondent organisation. It is nothing to the point that Mr Whittern was not in fact then appointed to the head of markets role. The opportunity to act in a role is likely to boost a person's prospects of achieving that role or some similar role in the future, whether within or outside the respondent organisation.

199. For the reasons we have outlined above, and with particular emphasis in this regard on the fact that Dr Niermann 's evidence as to whether Mr Whittern was the acting head, was, we have found, misleading, we concluded that the burden of proof passed to the respondent. And for the same reasons as in respect of the previous issue, we considered that the respondent had not discharged the burden of showing that sex had not played a material role and we upheld this claim.

Issue: Did the following treatment occur:

4.3 That the Claimant's application for the Head of Markets Compliance role was not fairly considered by Stephan Niermann.

200. The issue here was not whether the claimant should have been appointed to the post but whether she was fairly considered for the post. We have not considered at this stage evidence as to whether, absent sex discrimination, the claimant would have been appointed rather than Mr Dyos.

201. We bore in mind as context, that there was no evidence that Dr Niermann had had any training on how to conduct a fair recruitment exercise. There was little evidence as to what equal opportunities training he had had.

202. We did not consider that the statistics with which we were provided about women in management positions at the respondent enabled us to reach any general conclusions about the respondent or any specific conclusions about this issue. We also did not consider that the evidence about Dr Niermann's role in the promotion of women employees cast any light on this particular recruitment exercise. The evidence did not demonstrate that he had personally been involved in promoting women at the head of markets level but nor did it tend to suggest that he had unfairly failed to promote women to that level. Dr James' evidence about the respondent's various equal opportunities initiatives did not seem to tell us anything about Dr Niemann's approach to this particular recruitment exercise.

203. We concluded that the claimant had not been fairly considered for the post of head of markets. The features of the process which seemed to us to be unfair included the following:

- the claimant had a very short interview with Dr Niermann. No notes were made. There was no scoring contrary to the respondent's own recruitment procedure and no use of the template form which would have guided Dr Niermann to assess the claimant against some explicit criteria defined for the role;

- by the time the claimant was assessed by Mr Rock, in the same apparently informal way, it is difficult to know what objective evidence would have remained from the previous interview, in the absence of notes;

- contrary to the respondent's own procedure, there was a move to include external candidates before any proper assessment of internal candidates had been conducted. There was no attempt to prioritise the internal candidates.

204. Was the claimant treated less favourably than a man? In one sense she was not; the actual comparator, Mr Whittern also appears to have been subject to the same unsatisfactory and untransparent process

205. However, we also had to consider whether the whole process would have been the same (and equally unfair) had there been a hypothetical man in the claimant's position, ie someone with greater seniority than Mr Whittern who was identified as the best of the three internal candidates and appointable by Mr Walsh.

206. Dr Niermann was not able to say exactly when he ruled out the internal candidates. He told Mr Walsh that he had ruled them out by the time Mr Walsh was asked to interview external candidates in early November.

207. It was clear to us that one of the reasons Dr Niermann looked externally was the perception about there being unfortunate politics within the team including a perception of the claimant as being a divisive personality. As time wore on, we concluded that there were tensions in the team created by the appointment of Mr Whittern as acting head and the obfuscation around that appointment. That appointment we have found to have been discriminatory.

208. The perception of the claimant as 'divisive' was created in part we have concluded because of a perception about the difficulties with Mr Jooma being her fault, which we have already concluded was tainted by sex.

209. The structural problems in the team were not created by the claimant or any other internal candidate and there was no evidence from Dr Niermann as to why an internal candidate could not have addressed those issues.

210. The unreasonableness of Dr Niermann's failure to follow the respondent's recruitment policy was, we accepted, part of what appeared to be a more widespread laxness in compliance with the procedure. However, the unreasonableness in respect of the interviews of the internal candidates contrasted with the less significant unreasonableness of Mr Walsh's interviews with the external candidates. The external candidates had longer interviews, notes were recorded and Mr Walsh applied his own informal scoring system. We note however that there appeared to us to be a

significant risk of bias in Mr Walsh's methods, based on the evidence we heard from him. We were not satisfied that the explanation for the degree of unreasonableness by Dr Niermann was widespread disregard for the recruitment procedures. We had limited evidence as to the general practice but note that Mr Jooma used the appropriate form when recruiting the claimant.

211. Looking at those facts in particular and the not adequately explained unreasonableness of Dr Niermann in failing to use the respondent's own recruitment procedure, it seemed to us that there were facts from which we could reasonably conclude that the process was materially influenced by the claimant's sex, and in particular that Dr Niermann followed a process which was aimed at not appointing the leading internal candidate for the role because she was female. The lack of documentation and the minimalist interviews create serious doubt as to whether the interviews with Mr Rock were anything other than an attempt to go through the motions with the internal candidates. Alternatively, it may be that Dr Niermann would have been content with Mr Whittern being appointed but Mr Rock's opposition to that appointment meant that he then concluded that an external appointment should be made.

212. We considered the burden of proof had shifted and so we looked at Dr Niermann's explanation and the contextual facts and considered whether the respondent had satisfied us that the unfairness in the process was not materially caused by the claimant's sex.

213. Dr Niermann gave essentially two reasons for ruling out the claimant and other internal candidates:

- The team needed an overhaul and he was doubtful whether it was possible politically for an internal candidate to do the role;
- He wanted someone with more management experience than the claimant or other internal candidates had.

These were not reasons he detailed to Mr Walsh at the time of their discussion about the internal candidates

214. We were not satisfied that the respondent had discharged the burden of proof. This was for many of the same reasons we have rehearsed in relation to the other claims above – including Dr Niermann's impaired credibility, the opacity of the process, the paucity of contemporaneous documentation and our conclusion that his perception of the claimant and her 'divisiveness' and involvement in 'politics' was tainted by her sex. We also bore in mind that Mr Walsh, a credible person trusted by the respondent to be involved in the recruitment process, considered the claimant to be appointable. Her appointment as Mr Jooma's deputy showed at least that she was on a leadership path as did the 2014 talent discussion. The discriminatory appointment of Mr Whittern to the point person / acting head role which we found was also a factor in our conclusions.

215. There was no evidence that Dr Niermann actually investigated or considered what management experience the claimant had at the time. There were no notes of his brief interview and he did not give evidence of discussing management experience with her or looking at her CV. In the absence of any contemporaneous evidence that this was a factor and in light of the other factors we have set out above, we did not accept that this was a genuine explanation for the decision, alone or in conjunction with the concern about 'politics'.

216. The binding finding of the Tayler Tribunal as to the feedback meeting is evidence that Dr Niermann did not at that point provide any detailed feedback to the claimant that her lack of management experience was a factor in the decision-making. That finding was as follows: *We do not consider that that there was separate discrimination in Mr Niermann failing to provide feedback. We consider he did provide feedback of the limited nature that he stated that he wanted candidate that could hit the ground running. We do not consider that this referred to someone who would not be absent on maternity leave which is the basis upon which it was agued by the Claimant to be discriminatory. It really was a way of trying to explain that he wished someone to take over management of the Department and deal with what was in his perception a toxic environment; i.e. an explanation of the conduct we have found discriminatory, rather than a further free standing act of discrimination. We do not consider it had the purpose or effect of creating a hostile environment etc and do not consider it was an act of harassment.*

217. Our conclusion is that the claimant was ruled out for reasons connected with her sex without there having been any comparison of her with Mr Dyos. It was therefore not necessary for us to seek at this liability stage to assess what a non-discriminatory assessment of the claimant and Mr Dyos would have resulted in.

218. We upheld this complaint.

Harassment – s.26 EqA

9. The relevant protected characteristic of the Claimant is her sex.

Issue: 10. Were there were repeated denials by Stephan Niermann to the Claimant that Kevin Whittern had been elevated. Were those denials untrue?

219. The respondent's case, in a nutshell, was that the claimant was told by Dr Niermann at the meeting on 12 August 2015 that Mr Whittern was the point person. The position did not change thereafter and so the claimant was not misled.

220. On our findings of fact, Mr Whittern was more than point person and was 'acting head' as indicated in the Team Excellence documents. Dr Niermann did obfuscate with the claimant about that on 22 September 2015 and on 2 December 2015 and by implication at all times between those dates. The

claimant would have been confronted by evidence that Mr Whittern was being treated as and recognised as acting head and that position was denied by Dr Niermann when she raised it with him.

Issue: 11. If so, was this conduct unwanted?

221. We accepted that this conduct was clearly unwanted by the claimant. She wanted to know the truth about the appointment because not knowing it was confusing and destabilising.

Issue: 12. If so, did this conduct have the purpose or effect of:

12.1 violating the Claimant's dignity; or

12.2 creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

222. The claimant's evidence to us about the effect of the denials on her was that:

It undermined me, made me doubt myself and think I was going mad when he knew exactly what he was doing. Giving Kevin an elevated position above the deputy head, he created a pseudo position which he said meant nothing but it was above the deputy head. It was the person he wanted to speak to on a regular basis, he did not want speak to me and Janine on a regular basis.

223. The situation created or significantly contributed to the deterioration in relations between the claimant and Ms von Pickartz and Mr Whittern.

224. We concluded that the effect of the treatment was sufficient to create a degrading, humiliating or offensive environment for the claimant and that it was reasonable for the treatment to have that effect. Being misled by a manager about an important matter in the face of significant evidence to the contrary was treatment which would reasonably have the effect the claimant described on an employee in that work context.

Issue: was the conduct related to sex?

225. We considered that the fact that Dr Niermann's denials arose from his discriminatory appointment of Mr Whittern to the more senior role was sufficient to establish a relationship with sex.

226. For those reasons we upheld the harassment claim.

Time Limits – s.123 EqA

Issue: 13. Where any of the complaints made by the Claimant brought within the period of three months starting with the date of the act to which the complaint relates?

227. The last act which this Tribunal was considering was the further denial of Mr Whittern's elevation in December 2015. The claim form was presented on 12 September 2017.

228. However, the claimant initially had brought other claims to the Tribunal. One of the claims which succeeded before the Tayler Tribunal related to what happened to the claimant's role whilst she was on maternity leave:

> *On return from the maternity leave the Claimant found that substantial elements of her job had been transferred to Ms Burch. When the Claimant left for maternity leave Ms Burch took over nearly the entirety of her role. When Ms Bailey joined rather than providing maternity cover by doing the Claimant's job she provided support, advice and supervision to Ms Burch who continued to essentially undertake the Claimant's job. That is why no handover on the Claimant's return. There was no real intention of Ms Burch handing back the work to the Claimant,despite the protestations to the contrary, been essentially at the same level.*
>
> *... Thereafter we find that the Claimant was side-lined as Ms Burch line manager on her return from maternity leave and her role was diminished. That is continuing and we consider it is ongoing maternity discrimination***.**

229. It is important to note therefore that whilst none of the claims before this Tribunal is on its face in time, some of the other claims presented to the Tayler Tribunal were presented in time. If the claims in front of us are properly regarded as a continuing act when considered with the in time claims, those claims will also be in time.

Issue: 14. If not, were the complaints part of conduct extending over a period and, if so, what was the last act of that conduct extending over a period?

230. Dr Niermann returned to Frankfurt in December 2016 and had no further material involvement with the claimant. The respondent's submission to us was that the findings of maternity discrimination made by the Tayler Tribunal were findings made against Mr Dyos. There were no facts which could properly connect the earlier allegations we were considering against Dr Niermann with those claims so that there was a continuing act.

231. It did not appear to us, looking at our own findings of fact and the areas in which we were bound by the findings of the Tayler Tribunal that we could

properly conclude that there were continuing acts as between the allegations we considered and the claims upheld by the Tayler Tribunal.

Issue: 15. If any of the complaints made by the Claimant are out of time, has the Claimant proved that it is just and equitable that time should be extended?

232. We looked carefully at factors including the length of and reasons for the delay and whether the respondent was prejudiced by the delay.

234. The claimant was on maternity leave between March and September 2016. One of the matters she was already concerned about was Mr Dyos' appointment and she did not receive any feedback about that until 2 June 2016.

235. We considered the following:

- during the autumn of 2015, the claimant was being misled by Dr Niermann about the position in relation to the acting head role. She was seeking to understand what was happening and preserve her own position. At a time when she was preparing for maternity leave, she had imperfect information about a situation which was causing her concern.

- she was then on maternity leave and in our view could not reasonably have been expected to commence proceedings about the concerns which had been developing before her departure

- when the claimant returned from maternity leave she was faced with a situation where, on the findings of the Tayler Tribunal, much of her role had been removed. After a number of efforts to address the situation with Mr Dyos, she then brought a grievance in March 2017.

- she made significant efforts to resolve matters internally by applying for new roles and pursuing her internal grievance before pursuing Tribunal proceedings.

236. It seemed to us that the delay was explained by a combination of the claimant's developing knowledge of her position at work (which worsened over the period), her maternity leave and her sustained and sensible efforts to resolve the position internally. We note this statement from the grievance process which encapsulates the claimant's evidence about her developing sense that her promising career at the respondent was being undermined: *Jagruti feels that the profile she worked so hard to build has been diminished over the last 19 months and she is effectively starting over again with one hand tied behind her back.*

237. The respondent brought no evidence and made no submission to suggest that there was any prejudice caused to the respondent by the initial delay in

presentation of the earlier claims, either at the hearing before the Tayler Tribunal or before us.

238. In all of the circumstances we concluded that it was just and equitable to extend time.

Remedy hearing

239. The parties will be sent a notice of hearing for a two hour case management hearing to give directions for a remedy hearing.

Employment Judge Joffe
London Central Region
06/09/2022

Sent to the parties on:
06/09/2022

For the Tribunals Office