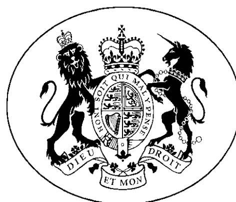

EMPLOYMENT TRIBUNALS

JUDGMENT

BETWEEN

CLAIMANT		**RESPONDENT**
MS H SOMMER	**V**	**SWISS RE CORPORATE SOLUTIONS SERVICES LIMITED**

HELD AT: LONDON CENTRAL ON: 20-22 & 25-29 APRIL 2022

EMPLOYMENT JUDGE EMERY
MEMBERS: MS F BENSON
Mr T ROBINSON

REPRESENTATION:
For the claimant: Mr Sommer (husband)
For the respondent: Ms K Balmer (counsel)

JUDGMENT

1. The claim of direct sex discrimination succeeds in part
2. The claim of maternity-related discrimination succeeds in part
3. The claim of sex-related harassment succeeds in part
4. The claim of equal pay fails and is dismissed
5. The claim of victimisation fails and is dismissed
6. The tribunal declares that the claimant was unfairly dismissed

REASONS

The Issues

1. The claimant was employed as a Band E underwriter in the London C&E department. She was dismissed, the respondent says on ground of redundancy, the need to make savings, and the decision that the claimant's role was not required. The claimant challenges the reason for dismissal, and she alleges she was subject to sex discrimination, sex and/or pregnancy and maternity discrimination, harassment, and victimisation following what is agreed was a protected act.

Sex discrimination

2. Did any of the acts of direct discrimination relied upon by the Claimant occur more than three months before the date on which the Claimant submitted her claim to an Employment Tribunal (extended, as necessary, by ACAS conciliation)?

3. If so, do any such acts form part of "conduct extending over a period" for the purposes of section 123(3) of EqA 2010, and was the claim brought within three months of the end of that period (extended, as necessary, by ACAS conciliation); and

4. If not, should time be extended to "such other period as the employment tribunal thinks just and equitable" under section 123(1)(b) of EqA 2010?

Less favourable treatment

5. Has the Claimant proven, on the balance of probabilities, that the following alleged acts or omissions occurred:

    i. on 13 December 2017, Mr Llewelyn making a comment to the Claimant, as at paragraph 67 of the ET1, that "*If I had breasts like yours I would be demanding too*" and that "*I bet you like to be on top in bed*";

    ii. on 8 November 2018, Mr Llewelyn making a comment, as at paragraph 69 of the ET1, about Julia Borges, Head of Surety EMEA, that she was "*reckloose*";

    iii. on 28 to 30 January 2019, Mr Llewelyn sharply and aggressively dismissing the Claimant's attempts to offer feedback in a meeting;

    iv. on 28 January 2019, Mr Llewelyn telling the Claimant that he thought she "*could do the work*" of a Senior Trade Credit and Political Risk Underwriter but that he did not think she would be a "*good fit*";

    v. on 8 February 2019, Mr Llewelyn shouting at the Claimant to "*shut up*" on a conference call;

vi. on 19 March 2019, Mr Llewelyn engaging in a "verbal attack" of the Claimant during a meeting with her to discuss her career development;

vii. On 19 March 2019, Mr. Llewelyn making the following comments suggesting that the Claimant "*was being discriminated against due to*" her sex and/or being victimised for performing a protected act on 8 February 2019
   - Accuse her of having a "dominant personality"
   - Ask her to speak less and listen more
   - Ask her "Why do you always try to be strong?"
   - Ask her to "show more vulnerability"
   - Ask her to take a "more submissive role"

viii. on or around 19 March 2019, Mr Llewelyn requiring the Claimant to complete a non-standard personality test and non-standard 360-degree feedback from her colleagues;

ix. in April 2019, the Respondent overlooking the Claimant for the Band D Senior Trade Credit and Political Risk underwriter role given to Andrew Tongue

x. in April/May 2019, the Respondent refusing the Claimant's request to work from home after she announced her pregnancy;

xi. on 9 September 2019, the Respondent asking the Claimant to make herself available for a handover call in the following week when she was off sick;

xii. in or around 25 September 2019, when the Claimant commenced maternity leave, the Respondent not giving the Claimant a baby card or gift;

xiii. from March 2019 to August 2020, the Respondent having internal discussions about the Claimant's continuation in her position, on the following dates:

a) 27-29 March 2019 email string titled "Update" (pages 514 – 517 of the Bundle)

- Robert Llewellyn stated "We're not going to rely on her [Claimant] leaving on her own accord" and "we should probably start to look into the proceeding with HR for initiating a PIP"
- This above email string was initiated 3 month after the Claimant received a very positive 2018 annual performance appraisal from her former manager Tobias Stahel and 2 months after she raised a sex discrimination grievance against Robert Llewellyn.

- The Claimant raised a sex discrimination grievance on 8 February 2019 after Robert Llewellyn shouted "Shut up, Julia!" during a global team conference call on the same day.
- Respondent withheld this email string from DSARs before ET1 was filed

b) 1 May 2019 email string titled "Julia Sommer" (pages 524 - 525 of the Bundle)

Two days after the Claimant announced her pregnancy, Kaspar Zellweger and Robert Llewellyn sent an email to HR to explore "boundaries" of "corporate policy as well as UK law" with regards to her pregnancy, medical condition and flexible working rights because they "are not really satisfied" with her performance and would like to "explore options" pertaining to a performance improvement plan.

c) 17 May 2019 email string (page 531 of the Bundle)

About 2 weeks after the Claimant announced her pregnancy, Kaspar Zellweger had a meeting with HR to enquire about her disciplinary record and reported to Robert Llewellyn that there had never been any HR warning against the Claimant.

d) 22 August 2019 cost savings spreadsheet (page 579 - 581 of the Bundle)

About a month before the Claimant commenced maternity leave, Robert Llewellyn, listed "underperformance" and "Going on Maternity leave in October" in the comments section next to the Claimant's name on a cost saving spreadsheet

e) 18 September 2019 cost savings spreadsheet (page 592 - 594 of the Bundle)

A week before the Claimant commenced maternity leave, Robert Llewellyn listed "let go in 2020" in the comments section next to the Claimant's name on a cost saving spreadsheet

f) 9 January 2020 email string titled "Catch up" (page 606 of the Bundle)

While the Claimant was on maternity leave, Kaspar Zellweger and Robert Llewellyn sent an email to HR stating that they wanted to explore options on how to terminate the Claimant's employment upon her return from maternity leave. Kaspar Zellweger wrote:

"Rob and I are in London 5/6 Feb and would like to have an informal meeting with you. The topic is in fact an old one the two of us have discussed quite a bit already: Julia Sommer. She is now on maternity leave with return expected 01/07. We want to explore options with you as we are not overly keen to put her into the old function / position…"

g) 21 April 2020 email (page 669 of the Bundle)

While the Claimant was on maternity leave and 2 weeks after both her comparators commenced employment at the Respondent, Robert Llewellyn sent an email to Gordana Spahni-Stankovic (Business Development Process Officer) stating: "We may also look to reduce the headcount in London (in accordance with the reduced budget) so the PRI underwriter role (Julia Sanasi) we may look to make redundant".

The Respondent did not inform the Claimant of the vacancies filled by her comparators

h) 19 June 2020 email rationale for the Claimant's redundancy (pages 681 – 682 of the Bundle)

While the Claimant was still on maternity leave and two months after her male comparators joined the Respondent, Robert Llewellyn sent an email to HR titled "Confidential - Rationale for deletion of E Band position in London" (which is the Claimant's role).

In the email he stated, "It was discussed and determined by the Credit & Surety Executive Team (one of which is the Global Head of Political Risk and Trade Credit), that Julia Sommer does not have the capabilities and skillset to progress from an underwriter to a senior underwriter with level 2 authority."

The Respondent did not inform the Claimant of the vacancies filled by her comparators

Respondent withheld this email string from DSARs before ET1 was filed

i) 30 June 2020 email string titled "Julia Sommer" (page 1450 of the Bundle)

While the Claimant was still on maternity leave, Kaspar Zellweger (Claimant's line manager) replied to Robert Llewellyn's email about her upcoming return to the office after maternity leave. Kaspar Zellweger asked Robert Llewellyn: "Anything I need to be aware of? I mean is she now made redundant or so?"

j) 8 July 2020 email string (page 691 of the Bundle)

A week after the Claimant returned from maternity leave, Robert Llewellyn and HR again discussed ways in which to terminate her employment, specifically, if they should initiate a performance improvement plan or make a business case for redundancy. Robert Llewellyn wrote:

"Just to follow up on Julia and gauge your reaction from the call on Monday – so it seems that Julia is looking to come back full time in September and my feeling is that no other options are on the table.

The question now is next steps, PIP or pursuing the business case for redundancy – would appreciate your thoughts on this as I think the scope of what is possible is now more limited….."

k) 5 August 2020 email string titled "Topics ET Strategic Meeting / 10 August 2020" (page 695 of the Bundle)

A month after the Claimant returned from maternity leave and was working part-time, Robert Llewellyn listed the topic "Challenges surrounding removal of Julia Sommer in London" on a meeting agenda to be discussed at a Credit & Surety Executive Team meeting (a meeting only for senior management).

i. in October 2019 and prior to April 2020, the Respondent failing to inform the Claimant of two senior underwriter vacancies whilst she was on maternity leave;

ii. in April 2020, the Respondent overlooking the Claimant for promotion to two Band D Senior Underwriter roles filled by Paul Barrett and Toby Marshall;

iii. in October 2020, the Respondent placing the Claimant at risk of redundancy;

iv. from 1 July 2020 onwards, when the Claimant returned to work on a part-time basis, Mr Llewelyn dismissing the Claimant's request to discuss deals, ignoring the Claimant and unfairly criticising her;

v. from 1 July 2020 onwards, Mr Llewellyn excluding the Claimant from PRIUM training sessions on 27 July 2020 and 13 October 2020;

vi. from 1 July 2020 onwards, Mr Llewelyn organising team meetings on the Claimant's days off, and declining requests to reorganise the meetings on a day which the Claimant could attend?

vii. after December 2018, the Respondent failing to conduct annual performance appraisals?

6. If so, by any of the above conduct, did the Respondent treat the Claimant less favourably than they treated or would treat a comparator in materially similar circumstances? The Claimant relies on the following actual comparators (which the Respondent contents are appropriate comparators in some instances):

   i. in relation to paras 5vii-x above, Mr Tongue;

   ii. in relation to para 5xi, Mr Tongue and Mr Barrett;

   iii. in relation to 5xii-xvii, Mr Barrett and Mr Marshall.

<u>Reason for less favourable treatment</u>

7. If so, was any such less favourable treatment because of sex or because she had performed a Protected Act on 8 February 2019?

B. Pregnancy/Maternity Discrimination

<u>Jurisdiction</u>

8. Did any of the acts of pregnancy/maternity discrimination relied upon by the Claimant occur more than three months before the date on which the Claimant submitted her claim to an Employment Tribunal (extended, as necessary, by ACAS conciliation)?

9. If so, do any such acts form part of "conduct extending over a period" for the purposes of section 123(3) of EqA 2010, and was the claim brought

within three months of the end of that period (extended, as necessary, by ACAS conciliation); and

10. If not, should time be extended to “such other period as the employment tribunal thinks just and equitable” under section 123(1)(b) of EqA 2010?

Unfavourable treatment

11. Has the Claimant proven, on the balance of probabilities, that the following alleged acts or omissions occurred:

    i. Omitted because event occurred before the protected period began

    ii. in April/May 2019, the Respondent refusing the Claimant’s request to work from home;

    iii. on 9 September 2019, the Respondent asking the Claimant to make herself available for a handover call in the following week when she was off sick;

    iv. in or around 25 September 2019, when the Claimant commenced maternity leave, the Respondent not giving the Claimant a baby card or gift;

    v. from March 2019 to August 2020, the Respondent having internal discussions about the Claimant’s continuation in her position, on the following dates:

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The Claimant raised a sex discrimination grievance on 8 February 2019 after Robert Llewellyn shouted “Shut up, Julia!” during a global team conference call on the same day.

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A week after the Claimant returned from maternity leave, Robert Llewellyn and HR again discussed ways in which to terminate her employment, specifically, if they should initiate a performance improvement plan or make a business case for redundancy. Robert Llewellyn wrote:

> "Just to follow up on Julia and gauge your reaction from the call on Monday – so it seems that Julia is looking to come back full time in September and my feeling is that no other options are on the table.
>
> The question now is next steps, PIP or pursuing the business case for redundancy – would appreciate your thoughts on this as I think the scope of what is possible is now more limited….."

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A month after the Claimant returned from maternity leave and was working part-time, Robert Llewellyn listed the topic "Challenges surrounding removal of Julia Sommer in London" on a meeting agenda to be discussed at a Credit & Surety Executive Team meeting (a meeting only for senior management).

i. from October 2019 and prior to April 2020, the Respondent failing to inform the Claimant of two senior underwriter vacancies whilst she was on maternity leave;

ii. in April 2020, the Respondent overlooking the Claimant for promotion to two Band D Senior Underwriter roles filled by Paul Barrett and Toby Marshall;

iii. in October 2020, the Respondent placing the Claimant at risk of redundancy;

iv. from 1 July 2020 onwards, when the Claimant returned to work on a part-time basis, Mr Llewelyn dismissing the Claimant's request to discuss deals, ignoring the Claimant and unfairly criticising her;

v. from 1 July 2020 onwards, Mr Llewellyn excluding the Claimant from PRIUM training sessions on 27 July 2020 and 13 October 2020;

vi. from 1 July 2020 onwards, Mr Llewelyn organising team meetings on the Claimant's days off, and declining requests to reorganise the meetings on a day which the Claimant could attend?

12. If so, did any such acts or omissions by the Respondent amount to unfavourable treatment of the Claimant?

13. If so, did any such acts occur in the protected period?

Reason for unfavourable treatment

14. If so, was any such unfavourable treatment because the Claimant was either pregnant or on compulsory maternity leave?

C. Sexual Harassment

Jurisdiction

15. Did any of the acts of sexual harassment relied upon by the Claimant occur more than three months before the date on which the Claimant submitted her claim to an Employment Tribunal (extended, as necessary, by ACAS conciliation)?

16. If so, do any such acts form part of "conduct extending over a period" for the purposes of section 123(3) of EqA 2010, and was the claim brought within three months of the end of that period (extended, as necessary, by ACAS conciliation); and

17. If not, should time be extended to "such other period as the employment tribunal thinks just and equitable" under section 123(1)(b) of EqA 2010?

Unwanted Conduct

18. Has the Claimant proved, on the balance of probabilities, that the following alleged acts or omissions occurred:

    i. on 13 December 2017, Mr Llewelyn making a comment to the Claimant, as at paragraph 67 of the ET1, that "*If I had breasts like yours I would be demanding too*" and that "*I bet you like to be on top in bed*";

    ii. on 8 November 2018, Mr Llewelyn making a comment, as at paragraph 69 of the ET1, about Julia Borges, Head of Surety EMEA, that she was "*reckloose*";

    iii. on 28 to 30 January 2019, Mr Llewelyn sharply and aggressively dismissing the Claimant's attempts to offer feedback in a meeting;

    iv. on 28 January 2019, Mr Llewelyn telling the Claimant that he thought she "*could do the work*" of a Senior Trade Credit and Political Risk Underwriter but that he did not think she would be a "*good fit*";

    v. from late January 2019 onwards, Mr Llewelyn engaging in "frequent passive-aggressiveness and micro-aggressions towards the Claimant, including ignoring, avoiding, dismissing and interrupting her;

    vi. on 8 February 2019, Mr Llewelyn telling the Claimant to "*shut up*" on a telephone call;

    vii. on 19 March 2019, Mr Llewelyn engaging in a "verbal attack" of the Claimant during a meeting with her to discuss her career development;

    viii. On 19 March 2019, Mr. Llewelyn making the following comments suggesting that the Claimant "*was being discriminated against due to*" her sex and/or being victimised for performing a protected act on 8 February 2019

        - Accuse her of having a "dominant personality"
        - Ask her to speak less and listen more
        - Ask her "Why do you always try to be strong?"
        - Ask her to "show more vulnerability"
        - Ask her to take a "more submissive role"

    ix. on or around 19 March 2019, Mr Llewelyn requiring the Claimant to complete a non-standard personality test and non-standard 360-degree feedback from her colleagues?

19. If so, did any of the above acts or omissions amount to unwanted conduct?

<u>Required Purpose or Effect</u>

20. If so, did this conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating and offensive environment for the

Claimant? In determining whether the conduct had the necessary purpose or effect, the Tribunal must take into account the factors listed in section 26(4) of EqA 2010 namely:

i. the Claimant's perception;

ii. the other circumstances of the case; and

iii. whether it is objectively reasonable for the conduct to have had that effect.

Related to Sex or because the Claimant performed a Protected Act on 8 February 2019

21. If so, was the conduct related to sex or of a sexual nature?

D. Equal Pay

Equal Work

22. Was the Claimant employed on work that was 'equal to' the work done by either or both of the following male comparators:

i. Paul Barrett ('Comparator 1'); and

ii. Toby Marshall ('Comparator 2').

23. In determining the issue at paragraph 22 above, was the Claimant's work 'like work' to that carried out by either or both of her comparators, within the meaning of s 65(2) of EqA? This involves considering under s 65(2):

i. what was the frequency with which differences between the Claimant's work and the work of either or both of her comparators occurred in practice, and the nature and extent of the differences?

ii. in the circumstances, was the Claimant's work and the work of either or both of her comparators the same or broadly similar wherein such differences as there were between their work were not of practical importance in relation to the terms of their work?

24. If the answer to issue 23 above is yes, should an equality clause be included in C's contract in accordance with s 66 of EqA 2010?

24a) Did the Respondent prove that their job banding scheme is compliant with all the relevant sections of the Equality Act 2010 and is objective, analytical and fair, and that there is an audit trail showing how decisions were reached and why?

24b) Did the Respondent's ongoing inability to produce accurate job descriptions that realistically reflect the necessary qualifications required as well as the actual duties and responsibilities of roles represent a detriment to the Claimant and/or constitute less favourable treatment of the Claimant because of her sex?

24c) Did the Respondent prevent the Claimant from underwriting trade credit business? If yes, did this represent a detriment to the Claimant and/or constitute less favorable treatment of the Claimant because of her sex?

E. Victimisation

Protected Acts

25. It is not disputed that the Claimant did a protected act on 19 October 2020 by raising a written complaint of discrimination in a formal grievance to the Respondent.

25a. Did the 8 February 2019 discussion between the Claimant and Mr Kaspar Zellweger constitute a protected act?
25b. Was Mr Llewellyn aware of such protected act and/or discussion?

25c. Did Mr Llewelyn's behaviour towards the Claimant became "*more intimidating*" after 8 February 2019?

25d. What does the Claimant mean when she says that she felt "*that he would retaliate at some point*"? Is the Claimant's subjective perception actionable?

25e. It is not disputed that the Claimant did protected acts on 14 November 2020 and 22 November 2020 by raising a written complaints of discrimination in a formal grievance to the Respondent.

25f. Did the Respondent's admitted rejection of the Claimant's harassment and victimisation grievance dated 7 February 2021 amount to unlawful conduct and/or a breach of their duty of care after the Claimant had informed the Respondent of her deteriorating health condition?

Detriments

26. Has the Claimant proved, on the balance of probabilities, that the following alleged acts or omissions occurred:
   i. after 19 October 2020, Mr Llewelyn excluding the Claimant from meetings and training, including the PRI Pipeline ongoing bi-

weekly meeting from November 2020 onwards and the “PRI Contract Frustration (Credit) Workshop - meeting 1” on 6 November 2020;

i. after 19 October 2020, Mr Llewelyn blocking the Claimant’s access to an important underwriting system (PRI Pipeline);

ii. after 19 October 2020, Mr Llewelyn blocking the Claimant from accessing/viewing the calendars of her comparators/colleagues;

iii. after 19 October 2020, the Respondent accusing the Claimant of performance and behavioural issues which had never been raised with her before;

iv. between 6 January and 10 February 2021, the Respondent investigating the Claimant’s conduct and various breaches of data protection;

v. the Respondent withholding the outcome of the disciplinary investigation in order to make the Claimant believe that she had a formal case to answer which could lead to severe disciplinary consequences

(The Respondent completed the disciplinary investigation on the 25 January 2021 but only informed the Claimant of the outcome on 10 February 2021 after the Claimant raised a harassment and victimisation grievance on 7 February 2021 on the disciplinary procedure.)

vi. the Respondent delaying the grievance investigation so that they could propel the unwarranted disciplinary investigation

vii. between 25 January 2021 and 10 February 2021, the Respondent delaying notifying the Claimant of the outcome of the disciplinary investigation report into alleged data protection breaches and only did so after the Claimant raised a grievance on 7 February 2021 on the disciplinary investigation;

viii. on 10 February 2021, the Respondent rejecting the Claimant’s grievance dated 7 February 2021 on the basis that it related to a complaint about the content of a without prejudice letter

ix. on 10 February 2021, the Respondent’s rejecting the grievance dated 7 February 2021 amounting to a breach of their duty of care after the Claimant had informed the Respondent of her deteriorating health condition

x. the Respondent accusing the Claimant of performance and behavioural issues (in the grievance outcome letter) which have never been raised with her before

xi. the Respondent misrepresenting the discretionary bonus multiplier (“Individual Payout Factor” or “IPF”) to the Claimant in an effort to justify unwarranted accusations that she had performance and behavioural issues

xii. the Respondent unnecessarily obtaining the Claimant’s highly sensitive medical information by providing false and misleading

representation on an occupational health assessment medical referral form

27. If so, by those acts, was the Claimant subjected to a detriment(s) by the Respondent?

The Reason Why

28. If so, was any such treatment because the Claimant had done the protected act at paragraph 25 above?

F. Unfair Dismissal

29. What was the reason (or, if more than one, the principal reason) for the Claimant's dismissal? The Respondent contends that the reason (or principal reason) for dismissal was a fair reason under section 98(2), namely redundancy.

30. Was the Claimant's dismissal fair in all the circumstances, pursuant to section 98(4) ERA 1996?

ISSUES ON REMEDY

31. If the Claimant succeeds in respect of any of the claims referred to above, what remedy, if any, is the Claimant entitled to? This may involve consideration of the issues below.

Reinstatement and re-engagement

32. Is the Claimant seeking reinstatement or re-engagement pursuant to section 113 ERA 1996?

33. If so, should the Tribunal exercise its discretion to make such an order, having regard to the factors in section 116 ERA 1996 including the practicability of reinstatement (the Respondent contends that such an order would not be practicable in view of the Claimant's role having been made redundant and the current team structure) and/or any contributory conduct by the Claimant.

Unfair dismissal compensation

34. What compensation, if any, is the Claimant entitled to pursuant to Section 118 ERA?

35. Should any award be decreased by virtue of a 'Polkey' reduction and, if so, by what amount?

36. Did the Claimant cause or contribute to her own dismissal? If so, should any compensatory award be reduced and, if so, by what amount?

37. Has the Claimant taken sufficient steps to mitigate her losses? If not, should any award be decreased on the grounds of the Claimant's failure to do so?

Other compensation

38. What compensation, if any, is the Claimant entitled to pursuant to Section 124 of EqA 2010?

Preliminary issues

39. There was disagreement at the hearing about the Issues, and the implications of the deposit order made earlier in the proceedings. There followed drafts of issues passing between the parties. A final list was agreed. Issues were raised about the effect of the EAT's Order of 12 April 2022, the without prejudice issue, and consequence redactions required to the bundle and after discussion there was agreement on this issue. Whether or not the claimant could still argue she made a protected disclosure in February/March 2018, the deposit order issue, the answer is no, but the evidence of this period is relevant to other claims. The effect of the Order on disclosure of medical evidence, and the ability of the claimant to use evidence to show pregnancy-related ill-health following non-disclosure.

Witnesses and Tribunal procedure

40. We heard from the claimant. For the respondent we heard from the following witnesses (the job titles are those at the time of the events in this claim):

- Mr Robert Llewelyn, the Global Head of the Political Risk and Trade Credit Team
- Ms Ellen Malloch, an Underwriting Assistant in the team
- Ms Ellie Brentnall, HR Officer
- Ms Pravina Ladva, Chief Digital Transformation Officer who heard the claimant's grievance and appeal against dismissal

41. The hearing was conducted remotely on the CVP platform. We arranged regular breaks. There were some issues with sound quality, but the evidence and questions were presented effectively and without difficulties for all participants. A bundle and witness statements were made available for the press.

42. The Tribunal spent the first day of the hearing after the preliminary issues reading the witness statements and the documents referred to in the statements.

43. This judgment does not recite all of the evidence we heard, instead it confines its findings to the facts relevant to the issues in this case.

44. This judgment incorporates quotes from the Judge's notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

The relevant facts

45. The claimant was employed from 14 June 2017 as a Political Risk Underwriter in the respondent's Political Risk and Trade Credit team (the team) to what the respondent contends was her redundancy.

46. 3 underwriters were employed in the team in London, others were employed in Zurich and New York. The team was led by Mr Llewelyn who was based in Zurich. It is part of the Credit and Surety Department, headed by Andreas Hillebrand.

47. The claimant was employed at Swiss Re's 'Band E', Assistant Vice President and was the only Band E underwriter employed in the London team. There were other Band E underwriters in the C&S department in London. Band E is a more junior position than Underwriters employed at Band D, Vice President.

48. The political risk element of the claimant's role in the team encompassed assessing the risk of a nation defaulting on debt, and the risk of state action impacting on business, for example confiscation or nationalisation of business assets.

49. From early 2019 the team started handling the respondent's Trade Credit risk underwriting. The claimant characterised this as a more complex area of underwriting The claimant argues that she was competent at Trade Credit, having worked as in this specialism in the past. She argues that she had *"significantly more experience"* than her comparators at Band D who were able to take on this work. However, as a Band E underwriter she was considered too junior to do so.

50. The parties accepted that Trade Credit was a small proportion of the respondent's work, as its appetite to handle such risk was more conservative than other insurers.

51. In a grievance submitted in November 2020, the claimant alleges she was subject to sexist conduct by Mr Llewelyn from early in her employment. She cites an incident on 13 December 2017 at work drinks. She says that when chatting in a group which included her Line Manager Tobias Stahal, she joked about relocating to London to demand that her then boyfriend now husband marry her after a long-distance relationship: Mr Llewelyn *"then joked at my expense, 'If I had breasts like yours I would be demanding too'. I responded: 'No, I just know what I deserve and what I want'. Robert smirked and randomly blurted out 'I bet you like to be on top in bed'"*.

52. In his grievance interview in November 2020, Mr Llewelyn categorically denied making these comments *"… I don't find this funny and it's not something I'd ever do. This sickened me the most".* In his evidence he called this *allegation "untrue - and unfounded … in 20 years I've never had any such allegations raised against me, because I don't speak like this … acting this way is career limiting."* He referred to others who had corroborated his character in the grievance process.

53. On 25 January 2018, following a work event, the claimant texted Mr Llewelyn saying she was back at her hotel and *“All is well”*; Mr Llewelyn responded *“Glad to hear hun, hope you get a good night’s sleep!”* (481).

54. In her grievance, the claimant refers to being called *“hun”* by Mr Llewelyn from December 2017 onwards *“when we were alone, which I found to be inappropriate, condescending, disrespectful and unprofessional. He did not address male peers with such familiarity and intimacy.”;*

55. Mr Llewelyn’s evidence was that this text was taken *“out of context”*, that he was *“tired when I replied”.* He said he called people *“dear or guys”*. He said *“… I think it was a one-off.”*

56. Mr Llewelyn’s statement contains allegations that the claimant made *“a number of inappropriate and derogatory comments about her relationship with her husband, at one point suggesting to the group that she was looking for an open relationship”* (para 17). In his questions, Mr Sommer called these allegations *“false, inflammatory, and scandalous”*. He said that this could not have been said, because the claimant was receiving IVF treatment at this time, wanting to start a family.

57. In his evidence Mr Llewelyn doubled down on this allegation saying it was true, that this is *“recurring behaviour I have witnessed”*. He said that the claimant’s comment was: her boyfriend *“should come and move and marry me, and move to here … she then said I am an open person in my relationship, I wish [my husband] would have views as I do”*. He said that there were witnesses to this conversation, that it was *“awkward and embarrassing”,* that it was witnessed by team members. He said that this conduct *“provoked a difficult conversation”* with the claimant in 2018, after he had consulted with other managers.

58. It was apparent that the claimant did talk about her relationship at social drinks, and a witness to some of the conversations was Ms Veronica Assandri Foldnes, a peer of Mr Llewelyn with whom she had a good working relationship, and from whom Mr Llewelyn sought advice from on staffing issues including on the claimant.

59. Ms Assandri Foldnes was interviewed grievance stage. She said that the claimant was not a direct colleagues but they had met and spoken on several occasions including social events: *“… I perceive her to be very outspoken and emotional – very talkative and lively. Some things I have experienced myself and heard from my team that she tends to get very emotional at social gatherings and talks a lot about her spirituality and very blunt about things concerning previous jobs or husband etc. A bit too outspoken at times, but a fun person to be around. In the office she seems a bit more to herself, I've never heard any other things”.*

60. Mr Llewelyn’s evidence was that he went to Ms Assandri Foldnes for advice on the claimant. Her statement at grievance was that discussions with Mr Llewelyn included *“…where at social events she was a bit unprofessional and a bit 'too much' at times – so we exchanged views on this and how to handle this.”*

61. Ms Assandri Foldnes does not suggest that the claimant was making statements about seeking an open relationship. We considered that what would have been quite an outrageous remark to make to colleagues would have been directly mentioned, she would have been told by her team or by Mr Llewelyn, and she would have noted it at interview stage. We do not consider 'a bit unprofessional' is referring to the comment alleged by Mr Llewelyn in his statement.

62. We also noted that there is a marked and self-evident difference in meaning between Mr Llewelyn's direct evidence, the claimant saying *"I am an open person in my relationship"*, to his witness statement, that the claimant was looking for an open relationship.

63. We concluded from this evidence that the claimant did discuss her relationship at social drinks, and may well have said, in terms, she had a more open personality than her husband. We consider that this is what was understood by those present, that her comments could be perceived as 'a bit unprofessional'. But she never raised, hinted or suggested any desire for an 'open relationship', as suggested by Mr Llewelyn in his statement.

64. We also concluded that the culture of quite open comments at social events was part of the culture encouraged by more senior managers including Mr Llewelyn, whose behaviour at events can be seen by his prior clumsy and offensive comment to the claimant.

65. We concluded that in raising this allegation for the first time in his statement, Mr Llewelyn has attempted to change the meaning and implication of the claimant's comments.

66. In his statement Mr Llewelyn suggests that he raised this issue with the claimant - feedback he had received from Ms Assandri Foldnes and Mr Hillebrand *"the feedback that she had been acting unprofessionally…"*.

67. We considered that if Mr Hillebrand had witnessed unprofessional conduct by the claimant he would have requested action in writing. The claimant denies Mr Llewelyn had this conversation. Mr Llewelyn said he raised the same issues with Mr Stahel, however there is no record that this occurred, and it was not raised by Mr Stahel in her end of year appraisal.

68. In an email dated 10 August 2018, Mr Llewelyn commented positively on feedback he had received about the claimant *"… and what was particularly impressive was the level of knowledge and detail …and how well you simplified what is a quite complicated and diverse topic…"* (483).

69. A significant issue arose in September 2018 involving claims about the claimant's conduct. The Tribunal accepted that the claimant was asked to address an issue which was of concern to her and to Mr Stahel – the accuracy of the PRI pipeline tool. This tool was collated in the main by Underwriting Assistants, one of whom, Ms Malloch, had been with the firm about 4 months at this date. The claimant's evidence was that there were significant errors being made in this document, often typographic, and she was tasked to address this. She raised her concerns with the UAs directly and with their line manager Ms Jackie Crow.

70. On 25 September 2018 Mr Kimber sent an email to Mr Llewelyn saying that the claimant had made *"complaints"* about the performance of the UAs, that she was saying their management had been delegated to her, that the outcome of her meetings with the two UAs *"dramatic"* with one employee *"deeply apologising"* for letting down the team, another (Ms Malloch) *"burst into tears"*, that the claimant was *"acting out quite inappropriately".*

71. Mr Kimber described the claimant's performance as *"manic"* saying he had seen similar behaviour from her. *"She has been particularly difficult to handle of late (power tripping, and not pulling her weight re enquiries because she is too busy finding 3 brokers to attend the industry dinner etc). She does not have the maturity or the interpersonal skills to be in a supervisory role."*

72. Mr Llewelyn responded, saying that all those involved should be interviewed *"to get the full picture from all sides"*; that if things are as bad as this, changes would need to be made *"…as this is not an acceptable situation or one which should be tolerated…"* (484).

73. The claimant at the time accepted that this issue was problematic. She sent an email to Mr Stahel saying that *"every time I have spoken with [Ms Crow] I have felt my feedback was met with mistrust and resistance rather than openness..."*. She asked as a consequence to be moved from the PRI project as she did not feel she could be an *"effective liaison"* between PRI and Business Services. She attached a draft email to Ms Crow for Mr Stahel's comment. This referred to the issues being quality - typos and missing data, incorrect recording of coverage type/perils; confusion between declinatures and advised interest; incorrect tenors being added - e.g. 118.8 recorded when it should have been 10 years *… this is clearly a typo and not a training issue."* She added that her comments to Ms Crow about these issues *"have been met with mistrust and resistance rather than openness..."* (490-94).

74. Ms Malloch's evidence was that there were issues with accuracy of the pipeline tool, her view was that the feedback was given poorly by the claimant. She also accepted that she and the claimant had a working relationship thereafter.

75. No one was formally interviewed about this issue. On 8 November 2018 Mr Llewelyn suggested as 'development actions' for the claimant some *"feedback training and maybe some soft skills training to improve her skills"* (496). T

76. In her grievance, the claimant alleges that Mr Llewelyn used derogatory terms about other female colleagues, for example on 8 November 2018 he referred to one senior colleague as *"reckloose",* citing a named broker as a witness *"…I felt the comment reflected poorly on Robert and Swiss Re".*

77. At grievance interview, Mr Llewelyn said *"I don't remember saying this and I don't think I'd ever say this. If I had made a joke I would have done it when she was there but not about her. It's not in my nature."* In his evidence, Mr Llewelyn denied knowing what reckloose meant, and he did not say it.

78. The Tribunal noted that there is a subtle but, we considered, important difference between his grievance statement and his Tribunal evidence: then -

he doesn't recall saying reckloose, he didn't think he'd ever say this word; now - he could not have said it as he does not know its meaning.

79. The claimant received a positive performance appraisal for 2018, both her and her manager Mr Stahel pointing out the challenges faced by the respondent, in part because of a negative perception amongst brokers of Swiss Re's direct relationships with its clients.

80. Mr Stahel points out the *"despite"* this perception, the claimant had been positive, showing a *"client orientated attitude, making the extra effort…".* She was described as "detail orientated" delivering *"great"* assessments "… *She is client orientated and challenges internal views which helped to facilitate internal discussions … Sometimes a better understanding of internal guidelines and SR might help to find the balance between client needs and [the respondent's] capabilities…"*. She had *"opened the door"* with one client, *"demonstrating that Julia has valuable business relationships…".*

81. She was told that she needed to make *"progress"* with wording and the non-credit side of PRI *"… which will remain a priority for 2019"* (476-481).

82. In his evidence Mr Llewelyn took issue with some of the content of this appraisal. He accepted that Mr Stahel was best placed to appraise the claimant, his view was that there were *"positive elements"* in this appraisal, and she did *"very well*" on some issues.

83. But it was not positive in other areas – his evidence was the work on *"empowerment and increasing knowledge on the non-credit side of PRI - these are significant areas to be worked on and needed to be improved*"; he argued there were *"development requirements"*.

84. He argued that Mr Sahel had been aware of the issue with the UAs, and Mr Kimber's feedback, that it was written after Mr Kimber had resigned, *"… and he is leaving and maybe he did not want to put it in the appraisal where it would be discussed…"*. He said that there were parts of the review missing.

85. The claimant's view was that the comment *"challenging internal views",* being *"client orientated"* was a reference to this incident. The Tribunal agreed, that there were nuanced comments in this appraisal about the claimant's performance, that he regarded this as on one hand positive – this was about meeting client needs, also saying that the claimant needed to understand the respondent's capabilities. We did not accept Mr Llewelyn's contention that Mr Stahel *"chose"* not to reference this incident, we accepted that the claimant and Mr Stahel would have known what this was referring to, as would Mr Llewelyn.

86. There is no reference in the appraisal to the 'challenging conversation' Mr Llewelyn says he had with the claimant about her conduct; again Mr Llewelyn's evidence was that Mr Stahel had been told about it, but he was leaving and consequently must not have wanted to raise this issue. Again, we did not accept this evidence.

87. There is no record the claimant was given a warning – as HR later confirmed. There is no evidence that the 'development actions' – soft skills and feedback training, were discussed with the claimant.

88. We concluded that as at December 2018 the total concerns that Mr Llewelyn had about the claimant was that she could be loud and occasionally opinionated, also that she had demonstrated some poor feedback skills in her interactions with the UAs. Specifically, he had no concerns about her work – including the overall number and nature of the underwriting instructions she took on, an issue which arose shortly.

89. We did accept that when working directly with Mr Kimber, the claimant sought advice from him, and that the advice sought was often a repeat of advice previously given; also that on occasions she disagreed with the advice she had just received and said so. We accepted that this caused Mr Kimber, a senior underwriter with over 20 years' experience, some frustration, in part because of the tone which the claimant could adopt, including interrupting and speaking over Mr Kimber. As Mr Llewelyn characterised it in a subsequent email, her and Mr Kimber did not get on.

90. Mr Stahel left the respondent end January 2019, Mr Llewelyn became the claimant's temporary line manager for a month, until Mr Kaspar Zellweger, a long-standing employee, returned from a sabbatical.

91. The next issue arose late January 2019 at a 3 day off-site team gettogether. One subject which was discussed was a new underwriting tool Mr Llewelyn had been developing.

92. As he put it when interviewed about the claimant's November 2020 grievance, *"… we had done a lot of tool development without having buy-in from rest of the team. So there was tension in the air …"*

93. The claimant's account, again given at grievance, *"… I noticed that every time I offered feedback, my comments were sharply and aggressively dismissed by Robert. … I felt that Robert's behaviour towards me belittled, discredited and humiliated me in front of my colleagues. Robert avoided and ignored me for the rest of the day and the remainder of the 3-day offsite."*

94. Mr Llewelyn's account at grievance: *"… so I probably became defensive. I don't think I was aggressive: I was trying to sell them this tool. Julia's comments were not too dissimilar to other comments. I think the way I reacted was not too dissimilar to others in the team."*

95. The same concerns arose on 8 February 2019 during a team call in which there was again significant push-back against the new tool. Mr Kimber's follow-up email to the team records there being a need *"to discuss process in a constructive manner … Any frustration I may show is simply because … At this point, I think [Mr Llewelyn] should just tell us what to do and how to do it going forward."*

96. There were opposing accounts of what had happened at the meeting. The claimant says that she was quiet for the majority of the meeting, in part because of what had occurred two weeks before when she raised the same

issues. As she says in her grievance, *" … Given Robert's aggressive and dismissive behaviour during the 2019 PRI offsite … I purposely withheld feedback … Norm pushed back on certain aspects of the model … Later, when I provided feedback … Robert interrupted me screaming, "Shut up, Julia!". There was an uncomfortable silence and tension …".*

97. Mr Kimber's account at the claimant's grievance was *"I also remember pressing pretty hard and a little pushy in that meeting. That was a tense event…".* He said that the claimant *"…wouldn't let it go"*, and was told to *"shut up".*

98. Mr Llewelyn's account, given at grievance interview *"… it's not something I was proud of and not something I'd normally do. Julia tends to talk over people and it had happened time and time again to other colleagues too and she just gets louder and louder. Towards the end of the meeting she then did it to me and I told her to "shut up".* He argued that *"in the same circumstances I would have reacted the same way to a man*

99. Mr Kimber similarly added: *"But to be honest she can be very frustrating so I wasn't surprised. … I've probably snapped at her myself as it happens sometimes: I know she's snapped at me plenty of times."*

100. The Tribunal accepted that the majority of the issues/concerns on the 8 February 2019 call were raised by Mr Kimber, and there was clear frustration expressed between him and Mr Llewelyn. It was towards the end of the call when the claimant was asked for her view and she started giving it, *"towards the end of the meeting she then did it to me…".* We accepted that Mr Llewelyn shouted *"Shut-up Julia"*.

101. The Tribunal accepted that she was asked to give her view and we accepted that she was entitled to give it without interruption. She did not talk over him in doing so, Mr Llewelyn talked over her. When she was told to 'shut up', she did.

102. We also noted that Mr Llewelyn's prior view at the awayday that the claimant's comments *"were not too dissimilar"* from those of other speakers. There is no complaint about her tone of interaction at this awayday. We did not therefore accept that the claimant's method of interaction was so different during the 8 February 2019 call – we accepted that it was not too dissimilar to other speakers.

103. After the meeting the claimant was visibly upset and she discussed what had happened with Mr Zellweger. There is no note of this meeting, we accepted the claimant's contention that she told Mr Zellweger she believed this behaviour was sex discrimination, that she was disrespected and undermined by Mr Llewelyn. She said she was thinking of submitting a grievance. Mr Llewelyn accepts that she had a conversation was Mr Zellweger and was *"really upset"* (his grievance interview).

104. Mr Llewelyn responded to Mr Kimber's email ccing the Team. The majority of the email related to issues arising from the discussion. The sixth and penultimate paragraph says *"Lastly, I would like to apologies for the frustrations show from my side during the call this morning, it's wasn't fair of me to shut*

Julia down in the manner I did and for that I apologies unreservedly…." [typo and grammatical errors copied from the email].

105. The Tribunal accepted that this was a qualified apology – he is not apologising for shutting Julia down, he is apologising for the manner in which he did it. It was written without care with an employee he knew was very upset by this comment. It was in the main a purely work-related email, the rest of which had no typos.

106. In February 2019 the claimant was told she would receive an Annual Performance Bonus of £8,000, following an 'IPF' score of 0.72 (500). Her IPF in 2017 had been 1.22, the highest on the team, (albeit after six month's employment).

107. There was significant evidence on how the IPF was calculated and what this term meant. The claimant's case is that it stands for Individual Payout Factor; the respondent characterised it as Individual Performance Factor. The Tribunal concluded that while its official meaning was Individual Payout Factor, it was used as a multiplier to the individual bonus sum, this score meaning the claimant would receive 0.72 of the individual bonus sum. We accepted that the IPF was often used by the respondent as a determining factor of annual performance as expressed in the individual annual bonus - that the words payment and performance were used interchangeably within the respondent.

108. The IPF range was 0 - 2, with 1 being average; 0.72 therefore gaining the claimant a much lower individual bonus than (say) 1.22. The claimant argues that her 2018 IPF bears no relationship to her positive 2018 appraisal. The claimant also argues that the IPF became the sole 'evidence' of what was characterised as her poor performance later on in her employment, that no consideration was taken of her positive 2018 performance review.

109. Mr Llewelyn's evidence was that the IPF was calculated as follows: the employee's line manager would have a discussion about their overall performance with that team's Global Head, who will take that discussion to the respondent's appropriate Executive Team, who will discuss and finalise the IPF score. We accepted this was the method of calculation.

110. The effect in January - February 2019 was that the claimant's IPF for 2018 was calculated by Mr Llewelyn alone as he was at this time both her line manager and the team's Global Head.

111. An Ivory Coast underwriting issue: the claimant received some criticism of this from Mr Kimber on 8 March 2019. The broker sent some questions at 4.50 on Friday afternoon; the claimant had left work and asked Mr Kimber or Mr Llewelyn to respond in her absence. Mr Kimber responded to Mr Llewelyn saying *"This is one of several transactions that Julia seems to have just delegated as she was in a rush to check out at 5pm on Friday, following two days of working from home. Who does that?"* Mr Llewelyn said that this is one of several things he would sit down and discuss with the claimant (504).

112. Mr Llewelyn's meeting with the claimant occurred on 19 March 2019 over 2 hours. The claimant's account of this meeting is in her grievance: the email

invite from Mr Llewelyn said it was to discuss her *"development and growth"*, after she expressed a wish to move to a Band D role.

113. Mr Llewelyn's evidence was that the claimant approached her about being considered for a Band D role, but as there were *"behavioural issues and performance issues"* she was not ready to progress.

114. The claimant's evidence was that she was criticised in this meeting, she was told that he had said 'shut up' to her *"because my personality was too 'dominant'"*; she should speak less and listen more; that she should *"show more vulnerability"*; that colleagues did not like her; she should be more submissive *"in order to learn from senior colleagues".*

115. In his evidence Mr Llewelyn denied saying she had a dominant personality. That he had *"enough points"* to make without using such words, for example he said he discussed with her *"where her behaviour needed to be adapted".*

116. Mr Llewelyn's first account of this meeting is in an email sent shortly after to Mr Zellweger stating: there was a difference in workload between her and senior underwriters, only 2/3rd of the work volume *"… and so that would need to be increased and sustained if she wanted to start being considered for any kind of senior position".*

117. He referenced her confidence in taking on work, saying he had received feedback that she would take on only easy deals and quick declinatures and if she had a problem she would refer to Mr Kimber without applying her own judgement; *"… I think its well understood that the relationship with Norm and Julia isn't great and so this 'he said, she said' stuff we don't need to get into".* She was told she could not work from home anymore.

118. He said The "*toughest issue was talking about various personality issues"* including *"her ability to listen … I think that active listening was a blind spot for her";* that she does not take advice or criticism well *"… so will argue to the hilt…"*; she was argumentative, with *"interactions with her tended to be quite difficult and tense … she has managed to have quite headed discussions with pretty much everyone in the team … unfortunately here she was very blind to her actions or the effects on the way she pushes people buttons"*; her speech volume, that she *"regularly raises her voice when she is trying to get a point across … on this point she actually acknowledged that there may be an issue."*

119. No note was provided of this conversation. In his evidence Mr Llewelyn reiterated that the concerns he had with her were *"issues with colleagues",* and that she needed to improve her knowledge on non-credit and understanding of Swiss Re Underwriting guidelines before she could be considered for a Senior Underwriter role.

120. In his evidence Mr Llewelyn was asked about his subsequent 360° feedback about the claimant, in which he said the claimant has the technical abilities to become a Senior Underwriter. He accepted that she had the experience, that the issue was more with behavioural issues, that this had been a *"positive comment"* to *"balance out'"* more negative feedback he had given. He accepted that her technical experience was good, that she was *"very experienced*" and had *"good understanding"* on certain aspects of the role. He

said that the issue was there were other capabilities that were missing *"…They can be learned if there is a willingness to learn, but [with the claimant] there was no willingness to take feedback or believe that anything needed to be addressed…"*.

121. There was disputed evidence as to how underwriters in the ream were allocated work. We noted the limited evidence in the bundle shows requests for political risk underwriting analysis were made by clients/brokers directly to the claimant, to senior underwriters in the team, and were sent to a general team email. Often these instructions were forwarded to the team a *"new one…"* for any underwriter to claim. The emails in the bundle show the claimant claiming these instructions, for example being told *"… feel free to have a look…"* (792-800, 532 and others).

122. The Tribunal accepted that deals were not distributed according to seniority, that deals were often discussed at weekly pipeline meetings and allocated after discussion. We also accepted that some deals were distributed according to particular expertise, whether to the claimant or to the senior underwriters.

123. We noted that there was no evidence apart from Mr Llewelyn's say-so that the claimant was only undertaking 75% of the work of similarly qualified and experienced underwriters. We did not accept that Mr Kimber's September 2018 email was evidence of a systemic underutilisation by the claimant.

124. Mr Llewelyn suggested at the 19 March 2019 meeting that she should do a 360° peer review and a personality assessment. In a follow-up email to Mr Zellweger he said he was concerned that *"… this talk has dented her confidence even further, but my bigger worry is that im not sure if we can solve or correct so many personality issues... but we will need to see a marked improvement in her behaviour otherwise we will need to look into a PIP."*

125. In his grievance interview Mr Llewelyn denied withdrawing his apology, but he accepted that he said her behaviour was *"forceful"* and *"aggressive". "I tried to say that some people don't react well to this behaviour and sometimes she needed to soften her approach. I did raise active listening as she does have an issue with listening: she is always focused on delivering her view. The aim was to help her self-reflection …".*

126. In response on 28 April 2019 Mr Zellweger said that he could *"foresee well a scenario where things sort out kind of themselves with her going to leave us."* Mr Llewelyn responded … *"unless we see a marked improvement in her output and change in attitude, then we will need to take proactive steps …. We're not going to rely on her leaving on her own accord if we don't think she is performing…"* (514-7).

127. The Tribunal concluded that it was by 28 April 2019 that Mr Llewelyn had taken the decision that the claimant was going to be managed out of the business. The steps he was suggesting, 360° feedback, personality test, were all directed at the claimant, no other member of the team, because of what he characterised as *"so many personality issues"*. These steps were, we concluded, a process designed to make the claimant either accept she did not have a future in the team and leave, and if not they would shortly commence a PIP process.

128. On 29 April 2019 claimant informed Mr Zellweger that she was 14 weeks pregnant, that her expected week of childbirth was 24 October 2019, that she intended to take maternity leave and return to work.

129. It was apparent that around this time staff members were asked to send issues of concern to Mr Llewelyn; on 30 April 2019 a staff member sent him emails from September 2018 in which the claimant says she has had sorted Christmas invites, *"When she spent ages getting me to sort invites hhaa"* (522). No other emails were disclosed.

130. On 30 April 2019 Mr Zellweger sent an email to HR (Charlotte Marsham) seeing some advice about the claimant. *"The 'case' has further evolved insofar as she announced this week her pregnancy and the announcement of another person to leave Swiss Re, in parts also apparently due to Julia's behaviour. That makes it for us fairly delicate"*. He believed there had been a prior HR warning to the claimant and asked for details (this was incorrect, there had no warning). *"Her pregnancy and combined with that her wish to work from home for medical reasons, we would like to hear more what the boundaries are of corporate policy as well as UK law (also in light of the next point) … We are not really satisfied with her performance. We suggested to her to go through a formalised personal assessment as well as a 360 review which we understand haven't been taken up by her. We also want to explore options around a PEP…".* (524-5).

131. Mr Llewelyn's evidence was that employees who didn't have market-facing jobs can work from home. For other staff it may be possible, but *"there is also a trust element … it comes to the manager trusting the employee to get work done. When there are medical situations … this is decided on balance, the perception of person, their performance …".*

132. On the issue of 'trust' Mr Llewelyn said in his evidence that this was based on the fact that feedback was that the claimant *"was taking on less work and doing less work - 2/3rd of transactions … it was being noticed by colleagues in the whole division that the claimant is selecting simple transactions which did not have merit or could easily be declined …"*. He said that this was noticed in 2018 by Mr Stahel, and by Mr Kimber, and he cited Mr Kimber's September 2018 email (484) as an example.

133. The Tribunal concluded that the only reference in documents is to the claimant not taking on work was the September 2018 email – not taking on enquiries when she was 'too busy finding brokers'; and an unattributed comment in the 360° feedback. Mr Kimber does not repeat an allegation she took on less work in his grievance interview. The claimant disputed she took on less work, or only took on easy deals. Mr Llewelyn's evidence is that this was noticed by Mr Stahel, but it does not form part of his end of year 2018 appraisal. It was never discussed with the claimant as a formal issue, apart from a passing reference in the 19 March meeting, that he had received 'feedback' to this effect.

134. Mr Zellweger had a meeting with the claimant on 7 May 2019 in which he said he did not support regular pre-set working from home days, giving operational reasons for this – visibility in the market and the need for ongoing 'on the spot' exchanges with colleagues. He agreed to allow her to change her hours to

avoid peak public transport commuting and to end her work day sending emails from home. In exceptional circumstances she could work from home (526).

135. On 8 May 2019 Messrs Llewelyn and Zellweger were asking Ms Marsham for information on 360° feedbacks, and she provided a *"very basic 360° review"* for them to use. No such review had been used for any employee in the team before.

136. The claimant took the suggested personality test, as did Mr Llewelyn and they shared their results.

137. The claimant and Mr Zellweger agreed that he would share and *"coordinate"* with the claimant on the 360° feedback before sending it to recipients; the claimant approved the questions and provided names of recipients. These included Mr Kimber and Ms Malloch.

138. An issue arose with a new employee, Senior Underwriter (Band D) Andrew Tongue. He broke a metatarsal which was put in a cast for up to 8 weeks. It was agreed that he could work *"occasional days from home"* because of difficulties travelling on public transport. We accepted that he worked several days from home during this period.

139. Ms Marsham collated the 360° feedback; there was a lot of negative feedback, including:

    - *"I don't know her well enough, but we have had some internal meetings where things have become quite heated if we are not following her way of thinking"*
    - *"unaware of the impact her behaviours have on people around her / her actions can be perceived by others"*
    - *"Some of her work is not that efficient …"*
    - *"Work rate is not as high within the wider team";*
    - *"Rather picks the easy deals and is not a problem solver. Processes fewer queries than the team";*
    - *"being accused of not doing our job correctly rather than noticing a repeating mistake and asking whether training could be given …"*

140. There were also positive comments: she *"Has the ability to become a senior underwriter [Mr Llewelyn's comment]… providing accurate/pragmatic info; … the parts of the job she knows, she does well; Helps new joiners with system issues/training"*.

141. Most of these comments are attributable to particular employees, this information having been lost by the respondent. Mr Llewelyn has identified some (but we do not think all) of his comments. Ms Malloch identified her comments. It is apparent that others were made by Mr Kimber.

142. The feedback was discussed with the claimant, and on 2 July 2019 Mr Zellweger updated Mr Llewelyn; the discussion was *"negatively revealing … she sees no fault on her side whatsoever around the hiccup she had [with UAs] … on the perception of always picking the easy deals she feels misunderstood and doesn't see how she could better support"* (567).

143. On 22 August 2019 an email from Davide Guidicelli, the Global Head of Bank Trade and Infrastructure Finance based in Zurich requested information on cost savings, *"but I suggest we proactively look into all possible actions … [with] the least impact on operational sustainability."*

144. Mr Llewelyn made some comments on a spreadsheet titled C&S Direct cost savings. The spreadsheet shows that some employees at D band had been replaced by E band employees; other entries showed a replacement was *"on hold".* The comment about the claimant was, *"managing underperformance - (ability and higher productivity). Going on maternity leave in October."* 22 August 2019 (581)

145. On an unrelated email on 6 September 2019 Mr Zellweger responded to Mr Llewelyn *"… also thanks for responding to Julia on her other nonsense question ☺"* (582).

146. The claimant had some pregnancy-related ill-health and time off work. She was signed off work on 6 September 2019, her email says that she may have to take her maternity leave earlier than planned and she would prepare a handover note. Mr Zellweger responded *"Sorry to hear that you are not feeling well. It is a bit unexpected though. Proper handover notes are certainly required. Additionally, may I kindly ask you to make yourself available on Monday for a joint team call … so that we can go through your stuff so that everyone is up to speed?"* (586-7).

147. Mr Zellweger sought advice from Mr Llewelyn; *"… what it is all about, sick leave or clearance for working from home....? Not quite clear to me".* Mr Llewelyn responded *"Don't worry too much about it - try and take it a bit easy with her (even though her behaviour is not the best) - just not worth getting into any arguments when she is so close to leaving for maternity - just not worth your energy with everything else you have going on."*

148. In response to Mr Zellweger's email, the claimant said that she had been in ER and had been warned a couple of weeks ago that her condition would worsen as her pregnancy progressed; *"Standing on my feet, carry a bag and even the vibrations of walking causes me pain and discomfort."* She asked to work from home if/when she was able to return to work before her maternity leave started.

149. On 19 September 2019 a further email from Mr Guidicelli about cost saving measures and the updated spreadsheet titled C&S Direct Cost savings – potential measures" states *"managing underperformance. Let go in 2020 and replacement on hold"* (594).

150. Ms Brentnall's evidence was that this was *"not a suggestion of what was going to happen"* in 2020, instead *"… we were being asked to look at what might happen and where there could be costs savings. …. It was us trying to understand what different situations - underperformance/PIP/redundancies - would look like. This was not a suggestion of what was going to happen, but an understanding of possible cost savings …".*

151. Ms Brentnall argued that the reason for this had nothing to do with her pregnancy, it was that she was *"failing in role and behaviour and skills … it was*

inconceivable that she was considered a credible candidate for a Band D role …".

152. An Organisation chart for the claimant's team dated 19 September 2019 states there are two D band Underwriters and 1 E band, for which the comment was *"open /approved position - freezed"* (595-6).

153. The claimant commenced her maternity leave on 25 September 2019, saying she would take one year's maternity leave, returning on 22 September 2020. No card or leaving present were given to her at this time or on the birth of her child, and the accepted evidence that this was done for other employees taking maternity or paternity leave.

154. Ms Malloch's evidence was that it was *"usually"* her who organised a card/present, and that her failure to do so was not a deliberate snub, or a malicious failure on her part to organise, and we accepted this evidence. It was our view that Mr Zellweger or Mr Llewelyn should have ensured that that this was done, as it was for other employees.

155. By end November 2019 a recruitment exercise was underway to replace Mr Tongue, and shortly after an exercise to recruit a further Band D underwriter. Interviews took place from 29 November 2019 and two candidates accepted offers on 13 January and 12 March 2020, commencing employment on 10 April 2020.

156. The claimant was made aware of Mr Tongue's leaving drinks which took place in January 2019, and she attended. We accepted that prior to being informed of his leaving drinks she was not given any indication that he was leaving or that interviews were taking place; we accepted also that this vacancy would show on the internal intranet.

157. On 6 January 2020 Mr Zellweger sought further advice from Ms Marsham about the claimant. *"We want to explore options with you as we are not overly keen to put her into the old function / position.."* (606). In his evidence Mr Llewelyn accepted that he was discussing her maternity leave and options on her return *"as we had decided that Underwriting was not the right fit for her, and other functions may be more suited, for example risk management …".*

158. On the question, if costs savings were required, why more senior underwriters being hired, Ms Brentnall stated that despite the cost savings directive, *"it was determined that we needed Band D underwriters";* Mr Kimber was transferring to the New York office, and Mr Tongue was leaving.

159. On 21 April 2020 Mr Llewelyn sent an email concerning the team, including a potential hire in Japan and a temporary halt to recruitment in the USA. On London: *"We may also look to reduce the headcount in London (in accordance with the reduced budget) so the PRI underwriter role (Julia Sanasi) we may look to make redundant."*

160. On 2 June 2020 the claimant advised in writing she wished to return to work 3 days a week on 1 July 2020 (680).

161. On 19 June 2020 an email from Ms Brentnall to Mr Hillebrand titled *“Confidential - Rationale for deletion of E Band position in London”*, attaching the 18 September 2019 C&S PGM Org chart: it stated that the email was to achieve cost reductions through *“the natural attrition of personnel through retirement or people leaving the organisation to pursue careers elsewhere”.* In addition *“Credit and Surety looked at all the business critical roles and functions to determine the levels that were required in order to remain commercially operational and a shortlist of personnel was identified for roles that didn’t meet that requirement.”* It said that it was *“identified that level 2 authority was the minimum underwriting level required for PRI underwriters in London in order to operate effectively within the controls and limitations of the Swiss Re guidelines and authorities … It was discussed and determined by the Credit & Surety Executive Team (one of which is [Mr Llewelyn]), that Julia Sommer does not have the capabilities and skillset to progress from an underwriter to a senior underwriter with level 2 authority.”*

162. The document specified the reasons why level 1 underwriting authority *“is not adequate for Political Risk business”*. The respondent’s *“approval matrix”* was referred to, that an underwriter with a level 1 authority *“has very limited approval authority for the types of business that is handled within Political Risk … an average approval level of USD1m for a level 1 Underwriter. This is a very limited authority and as such, a referral to a senior / level 2 underwriter would be required for each and every transaction …”.* It said that the *“E band position in London was not fit for purpose and as a result the role would be removed and the headcount would not be replaced.”*

163. Mr Llewellyn had catch-up calls every Wednesday with the EMEA team; these started when the two underwriters joined in April and were continuing on the claimant’s return to work. On 2 July Mr Zellweger emailed Mr Llewelyn asking for the claimant to be added to the participant list.

164. The claimant worked Monday, Thursday and Fridays. She asked for the meetings to be changed to one of her working days. Mr Llewelyn responded that they could not *“… I’m pushed with my own calendar - I really use this to bring the new guys up to speed on Swiss Reism’s so it’s up to you if you want to join - the main work meetings that are important for you will be the pipeline calls.”* 712/3??

165. In the subsequent grievance, Mr Llewelyn said that these were *“…the catch-ups with new employees. These catch-ups were just for new UWs that joined in April so we had put these extra meetings in.”* We noted that Mr Llewelyn’s characterisation of these meetings appear in the invite to accept the weekly meetings *“…a regular meeting in the diary to use as a general purpose catch up to go over any issues or raise any topics you think necessary.”* (690)

166. On 8 July Mr Llewelyn emailed Ms Brentnall, *“… so it seems that [the claimant] is looking to come back full time in September and my feeling is that no other options are on the table. The question now is next steps, PIP or pursuing the business case for redundancy – would appreciate your thoughts on this as I think the scope of what is possible is now more limited…”*.

167. On 5 August Mr Llewelyn was asking for an item to be added to a management Strategy Meeting; *“Challenges surrounding removal of Julia Sommer in London 10 mins”* (695).

168. Mr Llewelyn was critical of the claimant’s involvement in potential deal involving Rwanda. She provided an email analysis asking Mr Llewelyn *“I'd like to send out an advised interest since Rwanda is one of the better African sovereigns, however I'm a bit cautious..”* and asking for advice. In his response Mr Llewelyn raised specific issues with the document, then commenting *“if im being honest, im a little concerned with your approach and assessment of this and risk and as well as the judgement to take on such a large exposure in the current environment - I think we may need to have a call to go through this at some point next week.”* (696)

169. Mr Llewelyn accepted in his evidence that the claimant had the same concerns he had, that she had discussed these with senior underwriters already (1530).

170. Aside from this email, there were no other documented concerns about the claimant’s performance or rate of work following her return from maternity leave. We note for example that Mr Kimber does not suggest a low work-rate in his grievance interview, he does say her technical progress was a little frustrating.

171. On 9 October 2020 the claimant was told at a meeting and in a follow-up email she was at risk of redundancy. The reasons given: *“… due to the current market environment, the PRI premium for 2020 has been reduced by 50% and risk selection is significantly tighter. The forecast for the next couple of years envisages a continually challenged market environment that will continue to limit the number of PRI enquiries and the PRI business potential. Passive downgrades across the market have put additional pressure on capacity which will further impact and limit the amount of PRI business that can be written”*.

172. She was told the intention was to avoid redundancies through other costs savings, *“… but unfortunately the level of cost savings through those mechanisms has not been sufficient to hit the target internal cost savings required”.*

173. She was told C&S roles had been *“evaluated … It was proposed that in smaller teams, to facilitate the continued level of functionality, senior underwriters with senior levels of experience and higher accompanying underwriting authority levels were required and that the number of underwriters with level 1 authority or below could be reduced, so under this proposal, your role of Political Risk Underwriter would be absorbed by the team.”*

174. Ms Brentnall confirmed that the claimant was one of 3 Band E underwriters based in the C&S team in London with level 3 authority, she was the only one put at risk.

175. On 12 October 2020 the claimant signed off for 2 weeks.

176. Over the next weeks the claimant engaged in detailed and numerous emails with the respondent, asking questions and challenging the rationale for her redundancy. Her early questions (and answers given) including asking

whether others in the team had been put at risk (answer – no one), who was in the selectin pool (no one), the selection criteria and scoring (none), if no one else was at risk, why not (she was the only Band E underwriter).

177. She asked why she was no longer receiving emails from the PRI/TCI team since 13 October, (714-6), nor invited to training on this date. In the subsequent grievance it was established that team members had been told not to email her because she was on sick leave.

178. The claimant submitted a *"grievance and appeal against redundancy",* arguing that her selection constituted maternity, race and sex discrimination and asking that the notice of redundancy be withdrawn. She argued that since she commenced maternity leave she had been *"excluded from important trainings and team meetings, denied flexible work arrangements, ostracised, and treated disadvantageously compared to other pregnant women and white male colleagues"* within C&S. Since returning to work her attempts to discuss deals with Mr Llewelyn *"were dismissed or ignored".* She said that the issuing of the at risk letter was discriminatory as *"… no other employee in the C&S team was put at risk of redundancy",* there was no redundancy pool, scoring *"or any other objective selection criteria … but rather that I had been singled out despite being covered under enhanced maternity protection".*

179. She referred to being *"… deliberately excluded"* from training on *"business critical PRIUM training"* – a system designed by Mr Llewelyn "that will be essential for underwriting going forward". Mr Llewelyn's evidence was that there was migration to the new tool, that the claimant's name had been programmed into the system, but an oversight meant that access rights had not been delegated to her, that access was restored to her the day she raised it.

180. She referred to Mr Llewelyn's refusal to change the Wednesday meetings and him "downplaying" their importance. She referred to asking to work 1-2 days a week from home at the outset of her pregnancy, and that she could not do so without a sick note from her GP requiring her to work from home. She compared this to Mr Tongue's treatment *"During his recovery, Andrew could work in the office or at home as it best suited his situation…"* and referred to *"Other C&S colleagues … can work flexibly in the office or at home in line with the company's "Own the way you work" policy….".*

181. She referred to another pregnant underwriter in C&S Project Finance who could work flexibly in the office or at home. She referred to several employees for whom cards/lunch were provided on leaving maternity leave *"Yet no card or collection was ever arranged for me from the team at any point before, during or after my maternity leave."*

182. She argued she was subject to *"Harassment and Victimisation",* being shouted at by Mr Llewelyn at the 3 day off-site meeting and the 8 February 2019 call and the 19 March 2019 meeting (as set out above)

183. She argued she was subject to sex and race Discrimination: *"As the only female ethnic minority underwriter in the C&S department and one of the very few female ethnic minority underwriters at Swiss Re, I was blatantly discriminated against and overlooked for senior underwriter roles at least three*

time due to my sex and race." She says the feedback she received on 19 March was a *"verbal attack"* on her.

184. She referred to the alleged incidents of sexist conduct about her (all above) and the reckloose comment.

185. She argues that her treatment caused *"… severe and wide-ranging detrimental effects on my emotional, mental and physical well-being…* I began discussing *his behaviour and the extreme stress it was causing me in the early stages of my pregnancy with a psychologist. My treatment with her is ongoing. … I was later prescribed two types of medication for depression, anxiety, panic attacks and insomnia. "*(718 - 24).

186. As part of the grievance and appeal Mr Llewelyn was interviewed: Mr Llewelyn said that that costs savings were needed, the claimant was Band E, her performance was *"… an outlier of being particularly low".* He referred to the 360 degree feedback, stating that she blamed this on people not liking her, he said there were *"several incidences with Julia to do with her attitude and behaviour towards the team as well as her behaviour at social events…";* she had rejected the prospect of external coaching.

187. On the allegation she was excluded from meetings, Mr Llewelyn said that these were difficult to arrange as they involved 15 people from US, Asia and Australia. In a follow-up email he said that the reason why the claimant was not copied in after she was put at risk of redundancy was because she was off sick (749).

188. Mr Llewelyn suggested the following be interviewed about the claimant's behaviour: Mr Zellweger, Ms Assandri Foldnes; Mr Kimber; Becky Mcleary and Ms Malloch (743-8).

189. Ms Assandri Foldnes comments as above on the claimant. About Mr Llewelyn she said he *"might not be the most diplomatic in the way he says things sometimes. … He is very focused on team spirit and tries to motivate people."* She said he was "*respectful ... caring … very gentlemanly".*

190. She said that discussions with Mr Llewelyn about the claimant; *"where at social events she was a bit unprofessional and a bit 'too much' at times – so we exchanged views on this and how to handle this. But also generally there has been a lot of change in his organisational set-up and he was hoping that she would step-up and he was disappointed she wasn't performing well. So we exchanged views on this."*

191. Mr Kimber said that he had never witnessed any "negative behaviour" in the team, apart from *"…2/3 years ago there were maybe a couple of disagreements between Underwriting Associates and Julia as the relationship there wasn't very positive for a stretch – that did shift the team dynamic at that time. But it hasn't been an issue since. … For several months it made the work environment tenser but it levelled out"*.

192. Mr Kimber said he through the claimant was *"a nice person. From a technical perspective … she didn't have as much technical experience as expected. Sometimes a little frustrating (for lack of better word) as didn't see her*

progressing on the technical front: in terms of learning and development. … From an interpersonal perspective, frankly she's not very easy to get along with. She doesn't have the give and take. I have an open door policy and am approachable, but sometimes there were situations when she'd come and ask me a question and I'd be worried it would end up being an argument if she didn't like my answer…"

193. He said that at lunch times we would socialise and sometimes these situations would become combative and uncomfortable and often the disagreements were coming from her. He accepted the premise that she was *"quite strong-willed",* adding that she was *"not very open or good at listening"*.

194. On 14 November 2020 the claimant made new allegations, a breach of equal pay provisions. She argued she had been overlooked for promotion at least 3 times; Blocked from underwriting trade credit transactions despite having evidently and significantly more industry experience and credit training than my male colleagues or comparators" arguing that she performed "*very similar if not the same tasks"* as Messrs Barrett and Marshall; she said that the "only minor difference" was that her comparators underwrite trade credit transactions, accounting for less than 10% of deals underwritten "whilst I have been blocked from doing so", despite being trained to do so and having credit analyst experience and "Having more insurance industry experience underwriting trade credit business than my comparators", more credit training/

195. On 17 November 2020 the claimant submitted dates of meetings she said she had been excluded from - 14 and 21 August, - meetings she said she should have attended being the underwriter dealing with the Cote d'Ivoire issue "even though I was the original underwriter who analysed the risk, quoted the transaction and nurtured the relationship with the broker and the client before going on maternity leave"/. She said she was excluded from a marketing meeting on 18 August and a PRI workshop on 6 November.

196. She said that she had been exclude from Mondays and Thursdays bi-weekly PRI Pipeline meetings to 27 December 2020;

197. To address the grievance, Mr Llewelyn was asked for his views on the difference between the role of junior and senior underwriters. He referred to the job descriptions for the two roles. The similarities included the day to day underwriting tasks//functions and market interaction. A senior underwriter would undertake bespoke transactions, product development. Input on variance and underwriting, developing junior team members, develop pricing and peril knowledge and have a strong handle on market wordings. He said that their day to day role is *"not significantly different, however, the level of experience and expertise that an Senior underwriter should have and the application of those qualities in the day to day role is partly what makes the difference…".*

198. He referred to "an example" of the claimant's underwriting approach, the Rwanda email above – *"I understand from feedback in the teams and from her previous managers, this type of approach is not uncommon…. The mistakes on this example you might expect from a junior underwriter…"*

199. The Grievance was considered by Ms Ladva, and its outcome was provided on 16 December 2020. She accepted that the February 2019 IPF was the only formal document she considered on the claimant's performance in role, she could not recall seeing the claimant's 2018 appraisal, that in determining the claimant's performance she looked at the *"key points"* including the situation with the UAs in September 2018, the meeting with Mr Llewelyn in March 2019, the grievance interviews with Mr Llewelyn, Mr Kimber and Ms Assandri Foldnes. She said that the claimant was a *"non-performer"* as she was not meeting her objectives, technical or behavioural.

200. On the claimant's allegations of a failure to pay her equally to her make comparators, Ms Ladva stated that she considered the respective CVs and job descriptions of the Band D senior underwriters and she concluded that the claimant's role was E band and paid as such.

201. There was lots of evidence about the claimant's role in comparison to the Band D underwriters. We accepted that after Trade Credit merged with Political Risk in 2019 senior underwriters could undertake Trade Credit, she was not able to. We accepted that on paper the claimant had Trade Credit experience in previous roles. We noted also the respondent's evidence (Ms Brentnall), that Band D/E is a corporate banding structure.

202. For the respondent, Band D underwriters are more senior, should have a greater technical expertise, and have a greater authority to underwrite more bespoke deals. The claimant's view was that the difference in corporate bandings *"in reality"* made no difference in the day to day responsibilities of her role in comparison to Band D underwriters. Her view was that *"in theory"* Band D employees may have people management and project supervision roles but in reality there was no difference between the roles.

203. The Tribunal accepted that within the respondent's hierarchy, Band D underwriters are regarded as more senior, whether or not they have more actual experience in their careers than Band E underwriters, and that in their day to day role there was little difference between the tasks undertaken by Band D and Band E underwriters.

204. The respondent's case is that while the claimant has significant prior experience, it was predominantly as an Analyst, not an underwriter, with only 3 years prior underwriting experience. For the respondent these are two different roles, an Analyst does background research and provides reports to underwriters. The claimant said that the Analyst roles she undertook was "90% the same" as her role at the respondent: receiving risk from broker, assessing and writing up risk, discussing deal with head of Risk. She said the main difference was communication in the market, and the wide variety of products she was underwriting. She said that she had "significant experience" working with all credit insurance providers but was not allowed to undertake trade credit at the respondent.

205. Mr Llewelyn's evidence was that it is not unusual for Analysts to transition to Underwriter; he said that her previous experience is relevant, but that her cv showed gaps in non-credit products, that he would not expect her policy wording experience to be high. He did not accept that this experience was consistent with the experience of a senior underwriter.

206. In questions about the claimant's experience, Mr Llewelyn refused to move from his position that her role, which stated it required 3-5 years underwriting experience, was *"consistent with her experience"* as an underwriter. He did not accept that she had similar experience which made her a senior underwriter; his position was that the claimant could have gained a Senior Credit Analysis role with the respondent, but they were hiring a junior underwriter and the claimant was *"well positioned"* for this role. He accepted that the claimant had prior experience in credit analysis – to review and rate how risky a credit is – more so than her comparators.

207. However he argued that she had little prior experience of applying the underwriting judgment whether to take the risk. This would take into consideration amongst other things the credit analysis, business appetite, the industry – underwriters have to draw information from lots of areas to for the view on taking the risk.

208. Mr Llewelyn argued that a lot of the work is not about the risk analysis "around 50%" is ensuring policy wording covers the risk, that it *"takes time and experience"* to do so. This involves consideration of internal guidelines, and how to apply them; this was a development area in her appraisal.

209. He argued that the claimant's development needs were *"normal"* that he accepted that the claimant's development in the role was *"not spectacular but on par".* He said that her *"analysis and underwriting is good"* and that the claimant worked on *"good deals… good for the portfolio",* maintaining that the claimant was *"selective"* on the transactions she undertook.

210. He argued that when Trade Credit came into the political risk department, it was a minor part of the work, and a decision was taken to spread this to the Band D underwriters as a Band E underwriter cannot sign off a Band D transaction.

211. Mr Llewelyn accepted that Mr Barratt had 2 years 3 months prior experience as an underwriter when he was hired as a senior underwriter. He had been a Broker and made the transition into underwriting. He argued that Mr Barratt had a "*relatively high position"* in broking, and this is an *"easier transition"* into underwriting, in particular in policy wording and insurance products *"… So he had a very good understanding how products work, and wording, but not used to taking underwriting risk"* that there was a learning requirement, but that he had *"relevant experience".* Mr Marshall had 8.5 years underwriting experience, Mr Llewelyn argued that he had *"more directly relevant"* political underwriting and trade credit links when he joined.

212. The claimant argued that she was overlooked for the two roles appointed to in April 2020, *"… white males with less experience than me"* She provided a table (also in her witness statement) showing her greater experience than these peers. *"I am the only underwriter on the table above who has experience starting up a structured trade and contract frustration business for a competitor insurance company and managing the portfolio on my own for 3 years….".*

213. It was suggested to Mr Llewelyn that not all the Senior underwriter duties he describes in his statement were part of the role – they are not within the job

description – for example participating in panel discussions, sourcing market data, research. He argued that the JD cannot cover the full extent of the role; for example the JD also does not refer to claims handling, which SUs are expected to undertake. *"There is also an expectation that a SU will have significant experience of policy wording, which would be tested at interview"*.

214. Mr Llewelyn argued that the table at paragraph 112 of the claimant's statement does not include all of the Senior Underwriter responsibilities; it misses out policy wording as a skill; he did not agree that junior underwriters undertake time working with senior management for presentations and meetings; and that the claimant did not support the group risk management products team with PRI specific requests; he argued that 90% of a junior underwriters time would be spent on the core role (generating opportunities/preparing members of political risk transactions and developing the brand within the broker market); senior underwriters would spend 70% of their time. Junior underwriters would not spent time working on out of the box transactions. While her 2018 appraisal mentions her facilitating discussions, it was he who was leading this and junior underwriters would be ask to proof read his documents/add comments. The claimant did raise issues, for example about the narrow trade credit work, but it was him and more senior underwriters who undertook this work behind the scenes. He denied that she engaged in product development, instead arguing that she was looking at exclusions and thresholds, but was not involved in facilitating the changes being made.

Closing Arguments

215. Both the claimant and respondent's representatives gave written submissions. Ms Balmer also addressed us and these were considered and addressed in our conclusions below.

216. Ms Balmer argued that the core issue is about the respondent and its credibility, that the claimant's perception is unreasonable. There is no foundation that Mr Llewelyn based his views on anything other than his objective perception of the claimant's performance. She accepted that it was possible to reach a view unconsciously, but there was *"no evidence to base this inference … there is no foundation that his view was based on the claimant's gender or pregnancy/ maternity"*.

217. The 'shut-up' comment, the *"overwhelming evidence"* of all was that the claimant could be *"difficult and aggressive and dominant"*. One person forming this view - this is stereotypical, *"but when you have an overwhelming amount of contemporaneous evidence that this is how her behaviour was…"*, this supports Mr Llewelyn's perception. *"A man acting the same would be shut down"*.

218. There were concerns with her work *"… maybe this should be in her annual review … but it's his genuine views"*. It's also raised by Mr Kimber and Ms Assandri Foldnes.

219. Ms Balmer argued that the claimant's credibility was in question – she argues that the respondent fabricated comments and performance issues and raises behavioural issues about Mr Llewelyn for the first time the grievance. The claimant had her 360° feedback, the claimant's perception is not reasonable.

220. Equal pay: asking for a promotion to a Band D role is not the same as the claimant performing a band D role. There is a need to stand back and see the wood from the trees; this is about the "overall nature of the work, and a degree of seniority and responsibility, and the way the Band D role was positioned *"is of a different level, even if working together"*. One example is the Band D sign-off criteria, the increased judgment required. The claimant is being overseen as she does not have the experience and responsibility to sign off.

221. On the redundancy pool of 1, Ms Balmer accepted that the claimant *"can feel hard done by and concerned … it can seem unattractive, but it was legitimate"*. There was a pressure to save costs, to identify roles which could be redundant to make costs savings.

The Legislation

222. Equality Act 2010

13 Direct discrimination

A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

s.18 Pregnancy and maternity discrimination: work cases

1. This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.

A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably —
   a. because of the pregnancy, or
   b. because of illness suffered by her as a result of it.

3. A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.

4. A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

5. For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).

6. The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—
   a. if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;

b. if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

7. Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—
   a. it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or

   b. it is for a reason mentioned in subsection (3) or (4).

26 Harassment

(1) A person (A) harasses another (B) if—

a. A engages in unwanted conduct related to a relevant protected characteristic, and
b. the conduct has the purpose or effect of—

i. violating B's dignity, or

ii. creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…

3. In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

<u>s.27</u> <u>Victimisation</u>

(1) A person (A) victimises another person (B) if A subjects B to a detriment because
   (a) B does a protected act, or
   (b) A believes that B has done, or may do, a protected act.
(2) Each of the following is a protected act—
   …
   (d) making an allegation (whether or not express) that A or another person has contravened this Act.

<u>s.39 Employees and applicants</u>

(1) An employer (A) must not discriminate against a person (B)—
   (a) in the arrangements A makes for deciding to whom to offer employment;
   (b) as to the terms on which A offers B employment;
   …
(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;
(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service
(c) by dismissing B;
by subjecting B to any other detriment.

s.136 Burden of proof

1. This section applies to any proceedings relating to a contravention of this Act

2. If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred

3. But subsection (2) does not apply if A shows that A did not contravene the provision.

223. Employment Rights Act 1996 – Pt X Dismissal

s.98 General

1. In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show

a. the reason (or, if more than one, the principal reason) for the dismissal, and

b. that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

2. A reason falls within this subsection if it—

a. …
b. …
c. is that the employee was redundant…

3. …

4. Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)

a. depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

b. shall be determined in accordance with equity and the substantial merits of the issue

s.139 Redundancy.

1. For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

a. the fact that his employer has ceased or intends to cease—
   i. to carry on the business for the purposes of which the employee was employed by him, or
   ii. to carry on that business in the place where the employee was so employed, or

b. the fact that the requirements of that business—
   i. for employees to carry out work of a particular kind, or
   (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
   have ceased or diminished or are expected to cease or diminish.

Relevant case law

224. We considered the general case-law principles set out below, along with cases referred to by the parties in their closing submissions.

225. Direct Discrimination

a. Has the claimant been treated less favourably than a comparator would have been treated on the ground of his disability and (in relation to one allegation) on the ground of his race? This can be considered in two parts: (a) less favourable treatment; and (b) on grounds of the disability / race (*Glasgow City Council v Zafar [1998] IRLR 36)*

b. The requirement is that all *relevant* circumstances between complainant and comparator are the same, or not materially different; the tribunal must ensure that it only compares 'like with like'; save that the comparator is not disabled (*Shamoon v Chief Constable of the Royal Ulster Constabulary [2013] ICR 337*)

c. The tribunal has to determine the *"reason why"* the claimant was treated as he was (*Nagarajan v London Regional Transport [1999] IRLR 572)* and it is not necessary in every case for the tribunal to go through the two stage procedure*;* if the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than

trivial *(Igen v Wong [2005] EWCA Civ 142). "*Debating the correct characterisation of the comparator is less helpful than focusing on the fundamental question of the reason why the claimant was treated in the manner complained of.*" (Chondol v Liverpool CC UKEAT/0298/08)*

d. Was the claimant treated the way she was because of her sex? It is enough that her sex had a 'significant influence' on the outcome - discrimination will be made out. The crucial question is: 'why the complainant received less favourable treatment … Was it on grounds of [sex]? Or was it for some other reason..?" *Nagarajan v London Regional Transport [1999] IRLR 572, HL*. "What, out of the whole complex of facts … is the "effective and predominant cause" or the "real and efficient cause" of the act complained of?" (*O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School [1996] IRLR 372*, *[1997] ICR 33)*

e. London Borough of Islington v Ladele: *[2009] EWCA Civ 1357* provides the following guidance:

> (1) In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in *Nagarajan v London Regional Transport [1999] IRLR 572, 575*—"this is the crucial question". In most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator
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> (2) If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial: see the observations of Lord Nicholls in *Nagarajan* (p 576) as explained by Peter Gibson LJ in *Igen v Wong [2005] EWCA Civ 142*, *[2005] ICR 931*, *[2005] IRLR 258* paragraph 37
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> (3) As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test, which reflects the requirements of the Burden of Proof Directive (97/80/EEC). These are set out in *Igen v Wong*
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> (4) The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one.
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> (5) It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the tribunal simply to focus on the reason given by the

employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the *Igen* test: see the decision of the Court of Appeal in *Brown v Croydon LBC [2007] EWCA Civ 32*, *[2007] IRLR 259* paragraphs 28–39.

(6) It is incumbent on a tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are.

(7) It is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The proper approach to the evidence of how comparators may be used was succinctly summarised by Lord Hoffmann in *Watt (formerly Carter) v Ahsan [2008] IRLR 243*, *[2008] 1 All ER 869* … paragraphs 36–37) …"

f. *Chondol v Liverpool CC UKEAT/0298/08*, *[2009] All ER (D) 155 (Feb), EAT*: A social worker was dismissed on charges which included inappropriate promotion of his Christian beliefs with service users. His claim for direct religious discrimination failed as the tribunal found that 'it was not on the ground of his religion that he received this treatment, but rather on the ground that he was improperly foisting it on service users'. The EAT accepted that the distinction between beliefs and the inappropriate promotion of those beliefs was a valid one, and it was correct to focus on the reason for the claimant's treatment. Citing *Ladele*, the EAT again confirmed that 'debating the correct characterisation of the comparator is less helpful than focusing on the fundamental question of the reason why the claimant was treated in the manner complained of'.

226. Maternity discrimination

a. S*efton Borough Council v Wainwright [2015] IRLR90*: there is a difference in how the protections are afforded under s 18 EqA, on the one hand, and under reg 10 MAPL Regs, on the other. The former provides that, if possessing the protected characteristic, a woman has to demonstrate unfavourable treatment because of pregnancy or maternity leave. Regulation 10 provides that during the relevant period a woman is entitled to special protection and (by virtue of reg 20) will be treated as unfairly dismissed unfairly dismissed if this is denied. If Reg 10 is breached, this does not mean there is inherent discrimination for s 18 purposes. That went beyond the language of the statute and was not the assumption made in other authorities on reg 10 (or earlier provisions to the same effect). Here, the unfavourable treatment of the Claimant (her own position being made redundant and the failure to offer her a suitable alternative vacancy) certainly coincided with her being on maternity leave but that did not inevitably mean that it was *because* of it. The Employment Tribunal was required to ask what was *the reason why* the Claimant had been treated the way she was. The failure to do so was an error of law and this ground of appeal would therefore be allowed.

b. *Paquay v Societe d'Architectes Hoet + Minne SPRL*: *C-460/06*, *[2008] ICR 420 ECJ:* EqA 2010 s 18, the dismissal/detriment after the protected period has ended is also treated as discrimination if either it is because of her pregnancy or a resulting illness and is in implementation of a decision taken during the protected period (s 18(5), or it is because she exercised or sought to exercise a right to maternity leave (s 18(4), which applies irrespective of when the dismissal is implemented or was decided on. The ECJ also held that dismissal on the grounds of pregnancy or childbirth is in breach of the Equal Treatment Directive (76/207, regardless of when the decision to dismiss is taken, or when it is communicated.

c. S G Petch Ltd v English-Stewart UKEAT/0213/12, (31 October 2012, unreported): was the claimant dismissed for a reason connected with the fact she took maternity leave, when the redundancy situation has come about because the employer found it could cope without the employee's services during her absence on maternity leave? The selection of the employee could be within the reach of reg 20 if the reason she, rather than a colleague performing similar work, had been selected was the fact that it was her absence on maternity leave that had caused the existence of the redundancy situation to be appreciated by the employer.

d. Atkins v Coyle Personnel plc [2008] IRLR 420, EAT: ‘connected with’ requires a ‘causal connection’ but a wide and purposive interpretation of the legislation was required, with a common sense and pragmatic approach towards causation. cf Clayton v Vigers [1990] IRLR 177, EAT – a causal connection was not required.

e. Brown v Stockton-on-Tees Borough Council [1988] 2 All ER 129: a tribunal should consider the necessary causal connection particularly carefully if it is alleged that pregnancy or maternity, or a reason related thereto or connected therewith, was the real reason for dismissal.

> "[Section 99] must be seen as part of social legislation passed for the specific protection of women and to put them on an equal footing with men. I have no doubt that it is often a considerable inconvenience to an employer to have to make the necessary arrangements to keep a woman's job open for her whilst she is absent from work in order to have a baby, but this is a price that has to be paid as a part of the social and legal recognition of the equal status of women in the workplace. If an employer dismisses a woman because she is pregnant and he is not prepared to make the arrangements to cover her temporary absence from work he is deemed to have dismissed her unfairly. I can see no reason why the same principle should not apply if in a redundancy situation an employer selects the pregnant woman as the victim of redundancy in order to avoid the inconvenience of covering her absence from work in the new employment he is able to offer others who are threatened with

> redundancy. It surely cannot have been intended that an employer should be entitled to take advantage of a redundancy situation to weed out his pregnant employees."

f. Caledonia Bureau Investment and Property v Caffrey [1998] IRLR 110, [1998] ICR 603, EAT: C was unable to return to work after her maternity leave because of post-natal depression which had first arisen during her maternity leave. Her subsequent dismissal was automatically unfair under ERA 1996 s 99. This provision on its proper construction applied to a dismissal occurring after the expiry of maternity leave, in circumstances where (a) the contract of employment had been expressly extended, so that the notification to the employee that she had no job was a true dismissal, (b) the illness had arisen during the period of maternity leave, and (c) the illness was the direct cause of the dismissal.

g. Tele Danmark A/S v Handels-Og Kontorfunktionaerernes Forbund i Danmark (HK): C-109/00, [2001] IRLR 853, ECJ: A woman, hired for a temporary job lasting six months, was dismissed when she told her employers she was pregnant and was due to give birth before the end of her contract.

> "Since the dismissal of a worker on account of pregnancy constitutes direct discrimination on grounds of sex, whatever the nature and extent of the economic loss incurred by the employer as a result of her absence because of pregnancy, whether the contract of employment was concluded for a fixed or an indefinite period has no bearing on the discriminatory character of the dismissal. In either case the employee's inability to perform her contract of employment is due to pregnancy."

h. Clayton v Vigers [1990] IRLR 177, [1989] ICR 713, that a dismissal was automatically unfair where the reason was that the employer was unable to obtain a temporary replacement for a woman on maternity leave. The EAT refused to accept that the relevant wording required a direct causal connection; it was sufficient that the dismissal was 'associated with' the pregnancy

i. 'George v Beecham Group Ltd [1977] IRLR 43, IT: G had a poor attendance record due to her poor health. She received verbal and written warnings and, just prior to her entering hospital for a minor operation the employers issued her with a final written warning. They informed her that her forthcoming visit to hospital would not affect her position but that they expected regular attendance thereafter. G attended regularly for a month before she informed her employers that she was pregnant but intended to continue to work until nearer the birth. Two weeks later G suffered a miscarriage and was absent from work. The employers dismissed G and, in defence of their actions, stated that G had been dismissed as a result of her poor attendance record. The Exeter tribunal pointed to the fact that the employers would not have dismissed her if she had not been absent on that last occasion and that they knew that she was absent as a result of suffering a miscarriage, and held that this was some `other reason connected with her pregnancy' and that, in the circumstances, this

meant that the dismissal was automatically unfair [under the predecessor of ERA 1996 s 99].'

227. Harassment

a. *Driskel v Peninsula Business Services Ltd [2000] IRLR 151*: Determining whether alleged harassment constitutes discrimination involves an objective assessment by the tribunal of all the facts; the claimant's subjective perception of the conduct in question must also be considered. The tribunal is therefore required to determine both the actual effect on the particular individual complainant and the question whether that was reasonable in the circumstances of the case. *Pemberton v Inwood [2018] EWCA Civ 564*: "In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))." This means that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for them, then it should not be found to have done so.

b. *Dhaliwal* : "We accept that 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 grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase. We accept that the facts here may have been close to the borderline, as the Tribunal indeed indicated by the size of its award.'

c. 'Conduct': *'Prospects for People with Learning Difficulties v Harris UKEAT/0612/11*: suspension or other acts by an employer which would not normally constitute an act of harassment, can amount to acts of harassment; in this case the lack of forethought on the part of the employer and the peremptory nature of the suspension, with scant justification and absent prior consultation with the claimant, justified the tribunal's finding of unlawful harassment in this case.

d. Purpose or effect: Harassment will be unlawful if the conduct had *either* the purpose *or* the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. Where the claim simply relies on the 'effect' of the conduct in question, the perpetrator's motive or intention—which could be entirely innocent – is irrelevant. The test in this regard has, however, both subjective and objective elements to it. The assessment requires the

Tribunal to consider the effect of the conduct from the complainant's point of view; the subjective element. It must also ask, however, whether it was reasonable of the complainant to consider that conduct had that requisite effect; the objective element. The fact that the claimant is peculiarly sensitive to the treatment accorded him or her does not *necessarily* mean that harassment will be shown to exist.

e. Related to the prohibited grounds: The conduct must be 'related to' a relevant protected characteristic, including conduct associated with that characteristic. The tribunal has to apply an objective test in determining whether the conduct complained of was 'related to' the protected characteristic in issue. *Hartley v Foreign and Commonwealth Office UKEAT/0033/15:* Where adverse comments were made by managers amount an employee, the fact that the intent of the managers was not to "aim" at her condition was irrelevant – the tribunal must assess *"if the overall effect was unwanted conduct related to her disability.'*

f. *Land Registry v Grant* [2011] EWCA Civ 769: the tribunal must be careful not to cheapen the significance of the statutory wording; is must consider carefully whether the matters above can violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for her.

228. Victimisation

a. The parties accept that the claimant's grievance dated 11 November 2019 was a protected act.

b. Detriment: *MOD v Jeremiah [1979] IRLR 436*, *[1980] ICR 13, CA:* a detriment exists 'if a reasonable worker would take the view that the treatment was to his detriment'. A detriment must be capable of being objectively regarded as such - *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11*, *[2003] IRLR 285*, *[2003] ICR 337,* 'an unjustified sense of grievance cannot amount to 'detriment'. *Deer v University of Oxford[2015] EWCA Civ 52* - the conduct of internal procedures can amount to a 'detriment' even if proper conduct would not have altered the outcome.

c. Reason for the treatment: **T**he detriment must be 'because' of the protected act. *Greater Manchester Police v Bailey [2017] EWCA Civ 425* - it remains the case as under the pre-EqA legislation that this is an issue of the "reason why" the treatment occurred. Once the existence of the protected act, and the 'detriment' have been established, in examining the reason for that treatment, the issue of the respondent's state of mind is likely to be critical. However there is no need to show that the doing of the protected act was the legal cause of the victimisation, nor that the alleged discriminator was consciously motivated by a wish to treat someone badly they had engaged in protected conduct. A respondent will not be able to escape liability by showing an absence of intention to discriminate, provided that the necessary link in the mind of the discriminator between the doing of the acts and the less favourable treatment can be shown to exist. *Woods v Pasab Ltd (T/a Jones Pharmacy) [2012] EWCA Civ*

1578: 'the real reason, the core reason, for the treatment must be identified'

d. Where there is more than one motive in play, all that is needed is that the discriminatory reason should be 'of sufficient weight' *O'Donoghue v Redcar and Cleveland Borough Council [2001] EWCA Civ 701*, *[2001] IRLR 615, CA*

e. A claim for victimisation is not dependent upon the claim which gives rise to the protected act being successful - *Garrett v Lidl Ltd UKEAT/0541/08*

229. Unfair dismissal

a. *Barot v Brent* 0539/11 EAT: does the restructure entail a reduction in the number of employees required to do the role, or is it a redistribution amongst the same number pf employees whose work is the same?

b. *Excel Technical Mouldings Ltd v Shaw EAT* 0267/02 there was no redundancy when the claimant was dismissed and his job functions were reabsorbed by the managerial team because there had been no overall reduction in the number of managerial employees.

c. *Corus and Regal Hotels plc v Wilkinson* EAT 0102/03: there was no redundancy where a restructure resulted in the substitution of one post with another - the business requirements for employees to carry out the role had not ceased or diminished even though the identity of the persons carrying out his work had changed.

Conclusions on the evidence and the law

Direct sex discrimination

230. Did the following acts occur? If so, did the Respondent treat the Claimant less favourably than it treated or would treat an actual or named comparator(s) in materially similar circumstances? If so, was any such less favourable treatment because of the claimant's sex?

On 13 December 2017, Mr Llewelyn making a comment to the Claimant, as at paragraph 67 of the ET1, that "*If I had breasts like yours I would be demanding too*" and that "*I bet you like to be on top in bed*".

231. In concluding that this event did happen, our finding is that Mr Llewelyn exaggerated the claimant's statement at drinks that she was open in her relationship into an allegation which we found was meant to denigrate the claimant and undermine her evidence.

232. We concluded that there were similarities between the remark the claimant alleges against him and which he alleges against the claimant: they are allegations of sexual comments made during a conversation about her

relationship. We wondered why there was such a similarity – a coincidence alone?

233. We also wondered why such a serious allegation appears for the first time in Mr Llewelyn's statement, noting also that there is no corroboration such a remark was made by the claimant. Ms Assandri Foldnes was clearly in close contact with her London team and was aware of the claimant's character, but made no mention of it. The follow-up meeting Mr Llewelyn says he had with the claimant never occurred.

234. We concluded that Mr Llewelyn exaggerated an event at social drinks in an attempt to rebut the allegation against him. This we felt cast significant doubts on his credibility, and on his version of conversations and meetings.

235. In accepting he made this remark, we also accepted that there was a culture of open comments about relationships made at these events, a culture that the claimant participated in. We felt that his remark was out of character, as evidenced by Ms Assandri Foldnes view of his character. We noted that it was 'blurted' according to the claimant, an attempt we felt at a joke – sexist demeaning and derogatory but an attempted joke nonetheless - which went badly wrong and should never have been made.

236. The claimant didn't complain. We felt this was because she was a new employee, a junior underwriter and he was the global Head. We also felt that while she was offended, she did not let this change her conduct, being open and often exuberant and talkative at social events.

237. The claimant does not name a comparator. We concluded that the remark was a sexual one about the claimant's body, that Mr Llewelyn did not and would not have made to junior male underwriters who had recently joined the organisation, even if that comparator had talked in similar terms about their relationship.

238. There was therefore a difference in treatment between the claimant and a hypothetical comparator.

239. Was this difference in treatment on grounds of the claimant's sex? We concluded that it was; it was a direct comment about her anatomy and sexual positions, these comments were specific to her sex; the reason why these comments were made were because the claimant is a woman.

240. This allegation succeeds as an act of direct sex discrimination.

On 8 November 2018, Mr Llewelyn making a comment, as at paragraph 69 of the ET1, about Julia Borges, Head of Surety EMEA, that she was "*reckloose*"

241. We noted the difference in Mr Llewelyn's evidence at grievance and in his evidence at tribunal – from thinking he would not have said it to not knowing the word. We concluded that this remark was made and that he has changed his recollection to bolster his case. Again, it was a stupid remark, made in the context of an evening out where Mr Llewelyn viewed the claimant as quite blunt talking about relationship-related issues.

242. However we did not consider that this remark meant that the claimant was being treated differently than Mr Llewelyn would have treated a male comparator.

243. We considered that Mr Llewelyn would have made such a remark in the company of a male junior underwriter comparator, who he regarded as similarly blunt and open about relationship matters, and who he believed would 'get the joke'.

244. There was therefore no difference in treatment and this allegation fails.

On 28 to 30 January 2019, Mr Llewelyn sharply and aggressively dismissing the Claimant's attempts to offer feedback in a meeting

245. Mr Llewelyn's account was that he acted the same way towards the claimant as he did to others in the room, that he may have been defensive at times. We accept he was defensive, but we disagree that he acted the same towards all participants. If Mr Llewelyn felt able to tell the claimant to shut up on 8 February 2018, we concluded that he was prepared to act in a similar way, sharper and more aggressive, than he was towards other employees during these away-days.

246. We noted that Mr Kimber did not receive such treatment. We noted also that Mr Llewelyn did not consider the claimant was acting any differently to other participants when she gave feedback.

247. Did this amount to less favourable treatment? Mr Kimber is not an exact comparator - he is more experienced and less outspoken in his approach. A comparator is a male employee with similar experience who offered the same feedback in the same way as the claimant.

248. We did not feel that Mr Llewelyn would have been so sharp and so aggressive towards this comparator employee. We felt that Mr Llewelyn felt able to be dismissive of the claimant because he was irritated by her, in a way that he would not have been as irritated by a male who was speaking in a similar way. We concluded that Mr Llewelyn felt he could lose his temper with the claimant, in a way he would not have done with a male comparator employee. There was therefore a difference in treatment.

249. Was this difference because of the claimant's sex? We concluded yes – the reason why she was spoken to in this way was because Mr Llewelyn reacted badly towards a woman in a way he did not act towards a man.

250. This allegation therefore succeeds.

On 28 January 2019, Mr Llewelyn telling the Claimant that he thought she "*could do the work*" of a Senior Trade Credit and Political Risk Underwriter but that he did not think she would be a "*good fit*";

251. Similar remarks were made in writing by Mr Llewelyn about the claimant. We accept that he made these comments on 28 January. We concluded that this remark was made.

252. For the reasons set out in more detail below in the comparison between Band D and Band E experience, we concluded that a remark would have been made to a male employee with similar experience and aptitude; that at this date – 28 January 2018 - Mr Llewelyn's view of the claimant was that she was not there yet, but that she had the prospect of reaching Band D. He had some concerns about her interaction style, but he had not yet raised them with her.

253. We felt that the 'good fit' comment was not meant in a negative way; it was a very brief conversation – a chat about a meeting which was being arranged. At this date, we did not consider that Mr Llewelyn's view of the claimant was that she merited a PIP, or 360° feedback, or a personality test.

254. We contrast this with his remark nearly two months later saying that he was not going to rely on the claimant leaving of her own accord (514-17). Mr Llewelyn's position changed from the claimant being on par to her being on the path to exit in this period of time.

255. We considered that this remark would have been made at this time to a male comparator with similar expertise and experience, with whom there were also come questions about his interaction style.

256. There was therefore no difference in treatment, and this allegation fails.

On 8 February 2019, Mr Llewelyn shouting at the Claimant to "*shut up*"

257. It is accepted that this remark was made, the respondent's defence is essentially that the remark was not on grounds of sex, but on grounds of the claimant's personality, frustration at her manner of speaking in such situations.

258. How did the claimant conduct herself at this meeting? She was critical of Mr Llewelyn's new model, and said so, when she was asked for her comments towards the end of the meeting. Prior to this she said very little. Mr Kimber had been driving criticisms of the model.

259. We accept that the claimant's intervention may have been unwelcome, and seen as unhelpful. Was it made in such a poor manner as the respondent alleges?

260. The only evidence we have is Mr Kimber and Mr Llewelyn's witness evidence, some unattributable remarks during 360° feedback and Ms Assandri Foldnes opinion of the claimant's character - 'very *outspoken and emotional … very blunt …".* We accept that when the claimant raised work-related issues, she did so in a similar manner.

261. But, we also accept that her conduct was not seen as out of the ordinary in comparison with her colleagues by Mr Llewelyn at the previous week's awayday, and we did not think her behaviour was so out of the ordinary during this meeting.

262. Which means that the comparator must be a male junior underwriter in the company for similar length of employment, who make similar comments in a similar way – outspoken and blunt – but not completely out of the ordinary.

263. We do not consider that the way the comments were made justified Mr Llewelyn's reaction, and we also concluded that Mr Llewelyn would not have acted similarly towards a male employee who made comments in a similar way.

264. Mr Kimber was providing the main push-back, and did so without any hint of aggressive behaviour from Mr Llewelyn. In his apology, Mr Llewelyn refers to the manner in which he stopped the claimant speaking. We concluded that he was not prepared to hear what she had to say.

265. We considered that Mr Llewelyn felt able to be dismissive of the claimant, to act out his frustrations, to not listen to her, because it was the claimant who was making the point, that he found her comments and the manner in which she was making them irritating in a way he would not have found a man making similar points in a similar way irritating, and he showed his frustration.

266. We noted that one of Ms Assandri Foldnes criticisms of Mr Llewelyn is that he sometimes speaks before he thinks, and that this was the case here.

267. Was this a difference based on sex? We concluded yes, that the reason why Mr Llewelyn made this comment was his temper snapped, in a way he would not have snapped at a male colleague making a similar comment in a similar way.

268. Accordingly, this was an act of direct sex discrimination and this allegation succeeds.

<u>On 19 March 2019, Mr Llewelyn engaging in a "verbal attack" of the Claimant during a meeting with her to discuss her career development; &</u>

<u>On 19 March 2019, Mr. Llewelyn making the following comments suggesting that the Claimant "*was being discriminated against due to*" her sex for performing a protected act on 8 February 2019</u>

- <u>Accuse her of having a "dominant personality"</u>
- <u>Ask her to speak less and listen more</u>
- <u>Ask her "Why do you always try to be strong?"</u>
- <u>Ask her to "show more vulnerability"</u>
- <u>Ask her to take a "more submissive role"</u>

269. We accepted that these comments were made in what was a very negative breakdown of the claimant's personality. Mr Llewelyn characterises these in his email to Mr Zellweger as *"various personality issues … her ability to listen … she will argue to the hilt … heated discussions with everyone in the team … she pushes peoples buttons … regularly raises her voice…"*. These are not so far off the claimant's perception of the meeting.

270. We did not feel that this email contained an accurate summary of the claimant's conduct at work. Mr Kimber describes things settling down within the team after the September 2018 issue, Ms Assandri Foldnes describes

the claimant as often quiet around the office. We accepted that Mr Kimber was occasionally irritated by their interactions, and we accept that Mr Llewelyn was also irritated by the way the claimant interacted with him.

271. But we also felt that the comments made to the claimant were totally disproportionate to the claimant's actual conduct. Being a bit unprofessional at times, or a bit much, or occasionally irritating – which is what we considered was the total of the claimant's actions – did not merit this unprofessional deconstruction of the claimant's personality. The claimant was told that she was 'unreflective' and that the team did not like her. He make these comments in a forceful manner which brooked no disagreement. Mr Llewelyn's view was fixed, there was little the claimant could do to argue her position

272. At this date there was the following evidence of the claimant's capability: a positive first six months of employment in 2017 (IPF 1.22) a positive 2018 appraisal conducted in January 2019, with some development needs identified. Mr Llewelyn's evidence at tribunal was that the claimant was 'on par' in her role at this date. At the time he said the claimant had the capability to become a senior underwriter.

273. We did not consider that in the context of what was an on-par appraisal, where the claimant's work could be very positive, that such comments would have been made in such a way to a similarly unqualified male junior underwriter with a similar method of interacting. While Mr Llewelyn would have commented on issues of interaction which such a comparator, we felt that he would have done so in a far more subtle, professional and positive manner.

274. What of the fact that Mr Llewelyn may have been justifying his 'shut up' comment, and would have done so to a male comparator he had told to shut up?

275. We do not think that a male comparator with a similar personality would have been similarly criticised. We concluded that Mr Llewelyn would have been more likely to apologise for his actions and talk in a constructive and positive way about career development – his usual style – rather than the negative and unfair comments that he made to the claimant.

276. There was therefore a difference in treatment.

277. Was it because of her sex? We regarded some of the language as intrinsically sexist: a male would not be talked of in a negative way as having a dominant personality, or show vulnerability, or be submissive. The language was based on how he felt the claimant should behave as a junior female underwriter, he would not had a similar view of a male underwriter. And the reason why Mr Llewelyn felt able to talk in this way to the claimant was because she is a woman.

278. This allegation of direct sex discrimination therefore succeeds.

<u>On or around 19 March 2019, Mr Llewelyn requiring the Claimant to complete a non-standard personality test and non-standard 360-degree feedback from her colleagues</u>

279. It was accepted that no other employee was asked to undertake this. Would a similar male junior employee exhibiting similar traits as the claimant have been asked to do so? We concluded not. We concluded at this stage that Mr Llewelyn felt that the claimant's personality was at fault, that his outburst at her on 8 February was her fault and not his, and he would not have felt the same way about a male underwriter.

280. At this stage we concluded that he was determined to follow this through with a targeted approach which was designed to exit the claimant one way or another.

281. None of these thoughts were backed up by the evidence – the claimant's positive appraisal, the lack of evidence her behaviour was other than sometimes overexuberant, occasionally at drinks lacking in professionalism, and sometimes irritating, but also on par in her role.

282. We concluded that Mr Llewelyn's acts were now part of an act of continuing discrimination which had started on 8 February 2019, that following his outburst he decided the claimant was at fault for this, and her personality issues were such that she could not remain in role. We concluded that he would not have had this outburst with a male comparator; or if he did lose his temper he would have apologised and would not have blamed him afterwards or sought his dismissal.

283. We consider that this was continuing conduct based on the claimant's sex. The underlying reasons why Mr Llewelyn had a settled and negative view of the claimant, was because he blamed her, in a way he would not have blamed a male comparator.

284. We concluded that his actions after 8 February 2019 were an attempt to achieve her exit, by targeting her personality. We consider that Mr Llewelyn would not have targeted the personality of a male comparator in a comparable situation.

285. This allegation of direct sex discrimination therefore succeeds.

<u>In April 2019, the Respondent overlooking the Claimant for the Band D Senior Trade Credit and Political Risk underwriter role given to Andrew Tongue</u>

286. We noted Mr Tongue's cv, that while he appeared to have less overall experience in insurance, and lesser qualifications, he had been a junior (assistant) underwriter from March 2013, and a Senior Underwriter since April 2014. We accepted that the job titles are not comparable with the respondent; we also accepted that he had more underwriting experience than the claimant.

287. We accepted that the claimant was told in terms not to apply and did not apply for this role.

288. We concluded that a male comparator with a similar level of experience to the claimant and with similar competence would also have been told that he was not a good fit at this stage. The reason – the claimant still had development needs, and the comparator would have had similar development needs. While she was on par, she did not have what the respondent considered to be the required level of knowledge and experience for a Senior Underwriter at this time. She was not yet ready for this role, and neither would a male underwriter with the same level of experience and expertise.

289. To be clear, we did not feel that the reason why the claimant was not considered for this role was her conduct: at end January 2018 Mr Llewelyn believed that she could reach Senior Underwriter if she addressed the normal development points at this stage of her career.

290. There was no difference in treatment and this allegation fails.

In April/May 2019, the Respondent refusing the Claimant's request to work from home after she announced her pregnancy

291. We noted that this is a claim for maternity-related detriment (s,18 Equality Act), and 18(7) precludes findings of both maternity related and sex discrimination. Below we have found this to amount to an act of maternity-related detriment.

292. We also considered the alternative; what if this did not amount to a maternity-related detriment, could it be an act of sex discrimination?

293. We did not accept the respondent's arguments that there were significant behavioural issues affecting the claimant at this stage, or that there was an actual lack of trust in her ability to undertake her role from home. We accepted that in April/May 2019 she was quiet around the office, that she had pregnancy related health issues at this stage and she was quietly getting on with her role. There were no below-par developmental needs.

294. As found in the s.18 claim, we found that there was an attempt to minimise the claimant working from home, to send the message she was not welcome in the business.

295. We concluded that the respondent would not treat a male who needed time off work for health-related reasons in the same way. Mr Tongue was given the time-off, and she was not, and he is an appropriate comparator, an underwriter who did not have significant developmental needs, but who needed to work from home for a period. We found that this was a difference in treatment, that it was based on the continuing wish of Mr Llewelyn for the claimant to exit the business for the reasons set out above.

296. Accordingly, if this act does not amount to a maternity-related detriment, it does amount to an act of direct sex discrimination.

On 9 September 2019, the Respondent asking the Claimant to make herself available for a handover call in the following week when she was off sick;

297. We found this to be a maternity-related detriment.

298. We wondered why Mr Zellweger failed to understand the reasons for the claimant not being able to make it into work or what she was as asking for. While a difficult and complex situation, it was absolutely clear what the claimant was asking for: she was going on sick leave, and if she improved to be able to work, she wished to do so from home.

299. It is clear from her email that she was experiencing pregnancy-related ill health, that she was signed-off work. We were unimpressed with his response "… it's a bit unexpected…", was told to make herself available, he unnecessarily reiterated the need for handover notes. He engaged in a negative exchange with Mr Llewelyn, and was told in summary to calm down.

300. We considered that this exchange was again part of the continuing negative view of the claimant and the desire of Mr Llewelyn that she exit the business, part of the act of continuing sex discrimination. If it does not amount to an act of maternity detriment, it is an act of direct sex discrimination.

<u>In or around 25 September 2019, when the Claimant commenced maternity leave, the Respondent not giving the Claimant a baby card or gift</u>

301. We accepted Ms Malloch's evidence that she dropped the ball over this. We accepted that this was an oversight. We also accepted that for the claimant this would have been another negative event, one which she full well knew was unique to her, as she had participated in cards etc for male and female colleagues previously.

302. There was, we felt, not a difference in treatment. While male employees were clearly treated more favourably than the claimant, so were female employees. There was, we felt, no difference in sex between her and a hypothetical male employee in the same situation.

303. We felt that a comparable male employee in a small team, where their immediate manager and the Global Head were clearly unhappy with that employee, no-one would have taken the lead and provide what may be seen as a sign of support. That this treatment would have been accorded to a male comparator (or another female employee) in the same situation

304. This allegation of discrimination therefore fails.

<u>From March 2019 to August 2020, the Respondent having internal discussions about the Claimant's continuation in her position</u>

305. We accepted that from 8 February 2019 to the date of her dismissal, Mr Llewelyn adopted a settled position that the claimant should exit or be exited from the business. He did so having failed to control his temper when she was speaking on 8 February 2019, and for the reasons set out above, we considered his related actions amount to an act of continuing discrimination.

306. After this, the communications refer to – seeking advice from HR to initiate a PIP (never instigated); referring to the claimant from 22 August 2019 in 'cost savings spreadsheets' of individuals. We concluded that in adding her name to this costs savings, it was Mr Llewelyn's settled view she would be exiting the business (579-81, 592-4); seeking options from HR to terminate her employment. We concluded that the reason given in the 9 January 2020

email was Mr Llewelyn's settled view, expressed by Mr Zellweger: "we are not overly keen to put her into her old position". We noted that he did not discount her move to a more suitable role within the business.

307. We took from this evidence the view that Mr Llewelyn was in fact ambiguous in his own mind the claimant's qualities. If her personality at work was so bad, as he makes out, we concluded that he would not be considering her suitability for other roles.

308. By 21 April 2020 the issue turned to redundancy. A reason put forward at this time for her redundancy was that she did not have the requisite level 2 authority to underwrite most of the team's deals, that a more senior underwriter would have to be on hand to give this authority.

309. We noted that while there was a requirement to make cuts, global managers were tasked with deciding whether costs savings were possible and how to implement them, No other team in C&S London appears to have taken the view it could dispense with Band E underwriters.

310. Mr Zellweger was of the view that the claimant was to be made redundant before her return from maternity leave (1450). Then shortly after her return Mr Llewelyn was still debating a PIP, or whether to "pursue the business case" for redundancy .

311. We found it implausible this business reason was the actual reason for selecting the claimant for redundancy. There was no indication that a process whereby junior underwriters had to seek authorisation on deals had proved any difficulty whatsoever, in what was an interactive and discursive working environment. These work-related issues were discussed within the team on a daily basis – one of the rationales for not allowing the claimant to work from home during her maternity leave.

312. There was no sense that there was a lesser need for underwriters in the C&S team, that the requirement for underwriters as a whole within the team were diminishing; Band D underwriters were being replaced and there was no evidence that they had capacity to take on the claimant's work.

313. This decision would also mean that more junior underwriters were effectively barred from a role in the team as a consequence, which would pull up its cost base. In the team, deals were discussed, second opinions sought, and more senior authorisation required on many deals, including those of Band D underwriters.

314. We noted also that Mr Llewelyn was undecided in his mind which route to go down – PIP or redundancy. We think he decided it was more convenient to tag the claimant's dismissal as redundancy.

315. We concluded that the rationale for the claimant's redundancy was retrofitted onto a decision already taken to dismiss the claimant – whether by PIP or redundancy, or some other method. This was not a genuine rationale, and it is not one which would have been applied to a male comparator – an employee with similar length of service and competence as the claimant.

316. Accordingly these acts amount to a continuing act of sex discrimination, the genesis of which was Mr Llewelyn's outburst on 8 February 2019 and the decision made to exit her soon thereafter.

In October 2019 and prior to April 2020, the Respondent failing to inform the Claimant of two senior underwriter vacancies whilst she was on maternity leave;

317. We found that this did not amount to an act of direct discrimination, that a male employee with a similar level of experience and capability would have been treated similarly in a comparable situation.

318. While they were free to apply, they would not actively be encouraged to do so by their manager informing them of the vacancy.

319. There was no difference in treatment and this claim therefore fails.

In April 2020, the Respondent overlooking the Claimant for promotion to two Band D Senior Underwriter roles filled by Paul Barrett and Toby Marshall;

320. The first interviews for these roles were in December 2019, and the claimant did not know of these roles at this date.

321. We consider that the claimant cannot show that she would have been treated any differently than a comparator with similar levels of expertise, similar length of service, with similar 'on par' performance.

322. We felt that this compactor would have been treated the same; that as well as not being positively invited to apply, they would not have been promoted.

323. We do not feel that the claimant's comparators are directly comparable: in their experience, and they were external candidates.

324. This claim of discrimination therefore fails.

In October 2020, the Respondent placing the Claimant at risk of redundancy;

325. A decision was taken in February/March 2019 that the claimant would be removed from the business. Its implementation was delayed because Mr Llewelyn did not want to run a PIP/dismissal process during the claimant's maternity leave. There were no valid grounds for a PIP, apart from some concerns about over-exuberant and occasionally unprofessional behaviour, which was not in any event manifesting during her pregnancy while at work or on her return from maternity leave.

326. The costs savings rationale, which was retrofitted as described above, was a decision which naturally fell from Mr Llewelyn's settled decision, reached in February/March 2019.

327. We felt that this was part of the continuing conduct of Mr Llewelyn. This issue arose after he considered she was to blame for his loss of temper and this was intrinsically tied to the claimant's sex, and the decision to dismiss arose as a direct consequence of this view.

328. This allegation of direct sex discrimination therefore succeeds.

<u>From 1 July 2020 onwards, when the Claimant returned to work on a part-time basis, Mr Llewelyn dismissing the Claimant's request to discuss deals, ignoring the Claimant and unfairly criticising her</u>

329. The main evidence in the bundle relates to the Rwanda deal; Mr Llewelyn criticizes her judgment: as the evidence shows, this was a general 'new one' email, she takes it, she asks Mr Llewelyn for advice because of concerns she and senior underwriters have discussed, and he is then 'a little concerned' she has taken it this far.

330. This was, we felt an unjustified and unfair criticism, as Mr Llewelyn acknowledged she had discussed this with senior underwriters, that they shared the same concerns.

331. We had no other direct evidence of criticism. We felt that this was continuing conduct; that Mr Llewelyn did avoid interacting with the claimant, and that this was an example of an overcritical attitude he was displaying when they did interact. Again, we saw no evidence that the claimant's performance was poor, there was no other criticism in the bundle, other than Mr Llewelyn's assessment of the claimant.

332. It is noteworthy that there was no attempt to reset the relationship on the claimant's return to work; that straight away they are looking to exit her and considering a PIP.

333. He would not have sent this email, this continuing treatment would not have been exhibited towards a male employee of similar competence, who sent a similar email. Instead, this email was used as another example of competence issues to justify her dismissal.

334. We felt that this was part of the continuing conduct Mr Llewelyn was exhibiting, the wish to exit the claimant, and it amounts to a continuing act of direct sex discrimination.

<u>From 1 July 2020 onwards, Mr Llewellyn excluding the Claimant from PRIUM training sessions on 27 July 2020 and 13 October 2020</u>

335. As below, we found that the exclusion from the 27 July 2020 July training amounted to a maternity-leave related detriment.

336. We also considered in the alternative whether this amounted to an act of direct discrimination. Mr Llewelyn's evidence was that ultimately he was the organiser and must be responsible for who is invited to the training. She found out that there had been training during her maternity leave for which she would have considered using KIT days. On her return she only found out this training was happening when it was mentioned in a team meeting.

337. We found that the reason why the claimant was not told of the training on her return to work was because of the settled view that Mr Llewelyn wanted the claimant out of his team, that he was not going to tell her about the training, or add her name unless she specifically requested this. This was we concluded part of the course of conduct ongoing from February/March 2019, and he would not have acted similarly towards a male comparator.

338. This therefore constituted, in the alternative, direct sex discrimination.

339. We considered that the exclusion from training (and from all team emails) on 13 October 20 was not an act of direct discrimination. The reason why this occurred was that the claimant had been given notice of redundancy and immediately went on sick leave from 12 October. A male comparator under risk of redundancy who went on sick leave for 2 weeks would have been treated the same way.

From 1 July 2020 onwards, Mr Llewelyn organising team meetings on the Claimant's days off, and declining requests to reorganise the meetings on a day which the Claimant could attend

340. The claimant was sent the invite for the weekly catch up with EMEA on 2 July 2020, this was following an email from Mr Llewelyn saying he would "need to reschedule this meeting next week" (685). We noted that this was not cancel, it was to reschedule. However, Mr Llewelyn was not able to reschedule this meeting for one of her working days.

341. Mr Llewelyn characterized this meeting as unimportant, for new starters. We disagreed: firstly the claimant had 10 months off work, and needed to reorient herself. Secondly, this was during the pandemic when employees were not working from the office as a matter of course and so this was a weekly contact point for the whole team. As Mr Zellweger says in his covering email the claimant should join the call "so that [the new underwriters] get introduced to you respectively vice versa" and he felt it important the claimant be added to the mailing list for these calls (689). Thirdly, Ms Malloch was invited, not a new starter. Lastly, his own characterisation of the meeting – a *"general purpose catch up"*.

342. We concluded on the above evidence that the weekly catch up EMEA calls were important and that Mr Llewelyn's evidence was inaccurate on this issue.

343. We also concluded that at this date a settled decision had been made to make the claimant redundant. This can be seen by the 'pip or redundancy' email of 8 July. We felt that Mr Llewelyn simply could not be bothered to change the meeting date for an employee who was exiting the business.

344. The reason why he had this view, as we have said above, part of the continuing act of discrimination, the decision to exit the claimant following the events of February/March 2019.

345. This amounts to an act of direct sex discrimination.

Pregnancy/Maternity Discrimination

346. Has the Claimant proven, on the balance of probabilities, that the following alleged acts or omissions occurred? If so, do they amount to unfavourable treatment? If so, did any such acts occur, or if implemented after decided on, in the protected period?

347. If so, was any such unfavourable treatment because the Claimant was either pregnant or on compulsory maternity leave?

In April/May 2019, the Respondent refusing the Claimant's request to work from home

348. We did not accept the respondent's arguments that there were significant behavioural issues affecting the claimant in April 2019, or that there was an actual lack of trust in her ability to undertake her role from home. We accepted that in April 2019 she was quiet around the office, that she had pregnancy related health issues at this stage and she was quietly getting on with her role. There were no below-par developmental needs.

349. We accepted that in a client-facing role it was often necessary to work from the office, and we accepted that at this stage of the claimant's career it was beneficial to do so – for discussions, to facilitate career progression.

350. We noted that the 'boundaries' of policy were to be discussed – which we took as a statement that the respondent wanted to discuss the minimum it could do to facilitate working from home. We concluded that the rationale "not really satisfied" with her performance was not a fair or accurate assessment of the claimant – as above this was in the main the assessment made after Mr Llewelyn's outburst on 8 February 2018.

351. The claimant wanted to work from home because of health issues arising from her pregnancy. She was not unfit to work, and did not need a medical certificate to work from home; the respondent's precondition was that working from home could only occur if there were exceptional reasons, as a one-off.

352. While HR advice was sought, we concluded that the respondent was resistant to the very idea of the claimant working from home and ignored the pregnancy-related medical reasons why the claimant needed to do so. Instead of facilitating this request, or seeking further information on the pregnancy-related issues, the respondent was resistant to her doing so.

353. We concluded that the reason why the respondent was so resistant was because Mr Llewelyn wanted to exit the claimant. We decided that he turned down the claimant's request to work from home as part of this message to her, that he was not prepared to allow her any leeway, pregnancy or not.

354. This was, we concluded, Mr Llewelyn using the claimant's pregnancy-related health as part of his strategy.

355. We concluded that this denial of her request to work from home as a tactic in his strategy was therefore was a pregnancy-related unfavourable treatment.

<u>On 9 September 2019, the Respondent asking the Claimant to make herself available for a handover call in the following week when she was off sick</u>

356. We wondered why Mr Zellweger failed to understand the reasons for the claimant not being able to make it into work or what she was asking for. While a difficult and complex situation, it was clear what te claimant was asking for in her email: she was going on sick leave, and if she improved prior to her maternity leave she wanted to work from home.

357. It is clear from her email that she was experiencing pregnancy-related ill health, that she was signed-off work. We were unimpressed with his response "… it's a bit unexpected…", she was told to make herself available for a meeting, he unnecessarily reiterated the need for handover notes. He engaged in a negative exchange with Mr Llewelyn, and was told in summary to calm down.

358. We considered that this exchange was again an attempt to use the claimant's pregnancy-related symptoms – her pregnancy – against her, a tone of irritation; this was a continuing pattern of conduct since February 2019.

359. Again, we felt that there was the deliberate use of her pregnancy-related ill-heath, to achieve this goal, to make her feel unwelcome, to force her to go into work when she may have felt unable to, it was using her pregnancy to achieve this outcome.

360. This amounts to pregnancy-related unfavourable treatment.

<u>In or around 25 September 2019, when the Claimant commenced maternity leave, the Respondent not giving the Claimant a baby card or gift</u>

361. This is in one sense clearly related to childbirth and maternity leave and is a common occurrence. It appears to form part of the same pattern of making the claimant feel unwelcome.

362. However we concluded that this was an oversight, that while connected to her pregnancy, it was for a reason – an oversight – which was very unfortunate indeed, but which had nothing to do with her pregnancy or maternity leave.

363. This claim therefore fails.

<u>From March 2019 to August 2020, the Respondent having internal discussions about the Claimant's continuation in her position</u>

364. The dates of this allegation show that on the claimant's case discussions about a PIP and exit were had prior to her informing her employer she was pregnant. Her pregnancy delayed the decision being made, and the time elapsing changed the rationale of the decision from performance to redundancy.

365. We also noted that one email sent seeking advice on 1 May – 2 days after she has informed of her pregnancy – asks for advice specifically in light of her pregnancy; information on a PIP, etc. No note of HRs response apparently exists. As a response the respondent denied the claimant working from home unless in an emergency.

366. These discussions clearly relate to her pregnancy, and we infer that the advice HR gave to her managers changed, as no action was taken on a PIP.

367. We noted also the specific reference to the claimant's maternity leave and her future date of exit in the cost savings spreadsheets. We did not accept this was some kind of costs exercise, her name on this sheet was a settled intent. This connects back to the fact the decision was taken in the February/March period, and as set out in the 27-28 March exchange between Mr Llewelyn and Mr Zellweger.

368. While the claimant's pregnancy precipitated questions being asked, and the detrimental treatment as found above, the discussions on her exit were in no way connected to the fact that the claimant was pregnant or taking maternity leave. As set out above, we considered that this was a continuation of discussions already in train.

369. The same follows for all the correspondence relating to the claimant's exit in the list of issues, and descried in more detail in the direct discrimination section above. Some of it clearly relates to the fact of her maternity leave and her return to work, but these emails are not because the Claimant was on compulsory maternity leave.

370. The claim that this amounts to pregnancy or maternity-related unfavourable treatment therefore fails.

<u>From October 2019 and prior to April 2020, the Respondent failing to inform the Claimant of two senior underwriter vacancies whilst she was on maternity leave</u>;

371. As set out above, we found that this did not amount to an act of direct discrimination, that a male employee would have been treated similarly in a comparable situation, that it would have been a beneficial exercise to at least engage in.

372. However we concluded that this did amount to a maternity-related detriment. The claimant was not actively monitoring work emails. Mr Llewelyn at least was aware that the claimant wanted to consider a promotion. At this stage the claimant had no idea there were discussions with her about a PIP.

373. At this point, the experience required for Senior Underwriters had dropped from 10+ years to 5-10 years. The claimant had been an underwriter for 5 years. We considered it would be usual for the respondent to make all potentially qualified employees know of a vacancy, at least to it would facilitate a discussion about the prospects of gaining it.

374. We concluded that there was no wish for the claimant to be told about this role, or for this conversation to be had. The reason why she was not told was because she was on maternity leave, that there was a view that the respondent need not bother to tell her because she was on maternity leave.

375. This was therefore maternity-related unfavourable treatment, and this allegation succeeds.

In April 2020, the Respondent overlooking the Claimant for promotion to two Band D Senior Underwriter roles filled by Paul Barrett and Toby Marshall

376. The claimant was not ready at this time to step up to senior underwriter. While we can criticise the respondent for not informing her of the vacancy, we do not accept that the claimant was likely to be promoted had she applied.

377. Accordingly there was no maternity-related unfavourable treatment, this was in no way because the claimant was on maternity leave.

In October 2020, the Respondent placing the Claimant at risk of redundancy

378. We considered this to be an act of direct sex discrimination, for the reasons outlined above. Accordingly it cannot be an act of maternity-related discrimination.

379. We considered this as an alternative allegation – was it because a decision effectively taken when the claimant was pregnant or on maternity leave?

380. At the date the decision was taken to dismiss the claimant, there was no knowledge that the claimant was pregnant.

381. It was only during her pregnancy that the idea formulated of redundancy. We did not accept that there was a lesser requirement for underwriters at Band E, or at all. We concluded that Mr Llewelyn released in the claimant's maternity leave that they could, for the time being, do without a Grade E underwriter, that this decision was reached because the claimant was on maternity leave.

382. Accordingly, the selection of the claimant was because of this conclusion, that this was because she was on maternity leave. This was maternity-related unfavourable treatment, and – in the alternative to the direct discrimination claim - this claim therefore succeeds.

From 1 July 2020 onwards, when the Claimant returned to work on a part-time basis, Mr Llewelyn dismissing the Claimant's request to discuss deals, ignoring the Claimant and unfairly criticising her;

383. These acts are outside of the protected period. They also predated the protected period, from 8 February 2019 onwards.

384. We concluded that these acts related to the prior decision to dismiss the claimant, and not to the fact that the claimant had been pregnant and taken maternity leave in the interim.

385. This claim therefore fails.

<u>From 1 July 2020 onwards, Mr Llewellyn excluding the Claimant from PRIUM training sessions on 27 July 2020 and 13 October 2020</u>

386. We concluded that these events followed from a settled decision taken prior to knowledge of pregnancy to dismiss the claimant. There was no attempt to reset the relationship on the claimant's return to work, instead advice was sought to secure her exit, meeting dates were not changed to her working days, training was not provide for her on 27 July.

387. We did not feel that these decisions, taken outside of the protected period, were made because the claimant had been on maternity leave. This claim therefore fails.

<u>From 1 July 2020 onwards, Mr Llewelyn organising team meetings on the Claimant's days off, and declining requests to reorganise the meetings on a day which the Claimant could attend</u>

388. The same rationale applies as above. This amounts to an act of direct discrimination. We considered that this was part of the continuing act following the settled intention of Mr Llewelyn to exit the claimant.

389. It is not maternity-related unfavourable treatment and this claim fails.

<u>Sex Harassment</u>

390. Has the Claimant proved, on the balance of probabilities, that the following alleged acts or omissions occurred, and if so do they amount to unwanted conduct?

391. If so, did this conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating and offensive environment for the Claimant?

392. If so, was the conduct related to sex or of a sexual nature?

<u>On 13 December 2017, Mr Llewelyn making a comment to the Claimant, as at paragraph 67 of the ET1, that "*If I had breasts like yours I would be demanding too*" and that "*I bet you like to be on top in bed*"</u>

393. This occurred, and it was unwanted conduct. It was not, we considered, designed to harass the claimant, it was a horrible attempt at a joke in the context of the claimant's often blunt comments about her private life. In this context it was not sexual, it was effectively a comment about the claimant's relationship with her partner. But it was related to the claimant's sex, it was a comment objectifying her body.

394. We considered that this comment had the effect of creating a humiliating environment for the claimant. This was only a momentary event, and it was not mentioned again, but at this time we felt that when taking into account the circumstances – the social interaction, the claimant's openness, this was a step too far, and one which it was objectively reasonable for the conduct to have this effect.

<u>On 8 November 2018, Mr Llewelyn making a comment, as at paragraph 69 of the ET1, about Julia Borges, Head of Surety EMEA, that she was "*reckloose*"</u>

395. We noted that the comment does not have to be related to the claimant's sex: it was said, it was unwanted, and it was quite shocking and derogatory language to describe a fellow professional at a work-related event. We felt it again created an impression of Mr Llewelyn as speaking before he thinks, speaking recklessly and that it was humiliating for the claimant to hear him speak about a female professional in this way. Again, we did not consider Mr Llewelyn had the motive to create a humiliating environment; but in the circumstances we considered that it was reasonable for the conduct to have this effect.

<u>On 28 to 30 January 2019, Mr Llewelyn sharply and aggressively dismissing the Claimant's attempts to offer feedback in a meeting</u>

396. Mr Llewelyn did not act in the same way to any men in his team; it was unwanted conduct. We considered that while it did not have the intention and was instead a product of irritation, it did have the effect of creating a hostile working environment for her. For any more junior member of staff, it wold have a similar effect, and it was reasonable for it to have this effect.

397. Was it conduct related to her sex? We concluded yes, because it was the way he conducted himself, dismissive and occasionally aggressive irritation, that this was related to how she was expressing herself, which Mr Llewelyn did not appreciate from the claimant. His response was, we concluded, related to her sex, he responded in this way with this degree of irritation because she was a woman and he would not have acted this way to a man.

398. This was conduct related to her sex and this allegation succeeds.

<u>On 28 January 2019, Mr Llewelyn telling the Claimant that he thought she "*could do the work*" of a Senior Trade Credit and Political Risk Underwriter but that he did not think she would be a "*good fit*"</u>

399. This was not a remark which was said in a dismissive or negative way, unlike the way he had acted towards her in public settings during this awayday. Also, we did not think that this was a remark which was related to her sex; it was instead a remark which was his view that she was not at this stage ready for this role.

400. This allegation therefore fails.

From late January 2019 onwards, Mr Llewelyn engaging in "frequent passive-aggressiveness and micro-aggressions towards the Claimant, including ignoring, avoiding, dismissing and interrupting her

401. Apart from the evidence we have heard on the events described, there was no evidence or suggestion that there were other specific allegations of harassment. This allegation has no detail of specific events, and it therefore fails.

On 8 February 2019, Mr Llewelyn telling the Claimant to "*shut up*" on a telephone call

402. This happened it was unwanted conduct and while not intended, it had the effect of humiliating the claimant. It was reasonable for this to humiliate her, other employees would have felt similarly humiliated.

403. Was it a remark related to sex? We point to our findings above; that Mr Llewelyn reacted as he did because he was angry at the way she had spoken and he lost his temper, that her conduct was not such to justify any loss of temper. We concluded that this was a comment which was made because she is a woman, he would not have made such a comment in the manner, tone and words used to a man, that it was interrelated with her sex.

404. This was therefore an act of sex harassment.

On 19 March 2019, Mr Llewelyn engaging in a "verbal attack" of the Claimant during a meeting with her to discuss her career development

405. As above this relates to the allegations she had a dominant personality, she should show vulnerability, be submissive.

406. We considered that this amounted to sex-based harassment. The words we felt at this time were designed to affect the claimant, that Mr Llewelyn wanted to humiliate the claimant because he was blaming her for his loss of temper, that much of this language was inherently sexist and related to personality attributes which Mr Llewelyn did not consider appropriate for a female junior underwriter. The claimant was humiliated.

407. We concluded that this was conduct related to her sex and amounted to harassment on grounds of sex.

On or around 19 March 2019, Mr Llewelyn requiring the Claimant to complete a non-standard personality test and non-standard 360-degree feedback from her colleagues?

408. We considered that the claimant was targeted for this treatment, for the reasons outlined above, as part of Mr Llewelyn's wish to exit the claimant. This was humiliating and we consider that it was designed to be so, to make her feel uncomfortable and want to exit the business.

409. We concluded that Mr Llewelyn was pursuing a strategy, and using her personality to do so, a personality which he denigrated using sexist language. The 360° feedback was a direct result of this, it was conduct related to her sex.

410. This claim therefore succeeds.

Equal Pay

Was the Claimant employed on work that was ‘equal to’ the work done by either or both of the following male comparators: Paul Barrett (‘Comparator 1’); and Toby Marshall (‘Comparator 2’)?

Was the Claimant’s work ‘like work’ to that carried out by either or both of her comparators, within the meaning of s 65(2) of EqA?

411. We first considered the claimant’s application in role, and whether she demonstrated on her applying that she had the experience for a Band D senior underwriter role. We accepted that the post was advertised as a 3-5 years’ experience because it was felt that this was the relevant experience required for the role. We accepted that the claimant believed, as did the respondent, that she had the relevant experience for this role.

412. We considered that there were significant differences between the jobs descriptions for the Senior and junior underwriters.

413. We accepted also that the claimant was undertaking some elements of the senior Underwriter role. She was doing management work, the pipeline project being one example. She had good relationships with brokers, and was bringing in work. We accepted that the claimant did not pick and choose deals, that these were allocated as above.

414. However we also noted that the claimant was not able to finish the pipeline project, that she had created an issue with Underwriting Assistances in part because of the tone she adopted.

415. We noted that 2018 appraisal, which was positive but which did include some development needs, including wording.

416. Based on the evidence we heard and read, we concluded that the claimant was at end 2018 and into 2019 at a good level of experience as an underwriter, that with her prior Analyst and underwriting experience she was regarded as a 5-6 year experienced underwriter, with some development needs as were normal at this level. Some of these development needs were noted in the appraisal, and others, such has her interactions with employees when supervising their work needed to develop.

417. We also accepted that the claimant was seeking advice on some transactions where others of similar capability and experience would not: we did not see anything wrong with this – it is often appropriate to sense check – but this also

fed into the perception of the claimant as still at junior underwriting experience and ability.

418. Based on the evidence, we concluded that the claimant was ‘on track’ in her progression from junior to senior underwriter, including on her technical and client-facing experience, but that there were some development needs which meant that she was not yet at the level of a senior underwriter.

419. We agreed that there was a difference of “practical importance” between junior and senior underwriters, and in particular between the claimant and her comparators. And that is the broad range and greater experience, the accumulated knowledge gained in their roles prior to joining the respondent. We accepted the respondent’s perception that the claimant had lesser experience, and that joining as junior underwriter was the right fit for her. We considered that this perception was, as far as we could tell, an accurate perception; her comparators had – in one case just – more underwriting experience. Mr Barret was several years more experienced that the claimant; and this greater accumulated experience meant he was suited to step into a Senior Underwriter role. We felt that Mr Marshall also demonstrated this experience during his recruitment.

420. We also felt that while these candidates may have had weaknesses, it can be easier to hide these as external candidates, unlike the day to day scrutiny on current employees.

421. For these reasons, the valid perception that the claimant was not at Senior Underwriter level because of gaps in her knowledge and experience, there were differences of practical importance between their roles.

422. Accordingly the equal pay claim fails and is dismissed.

Victimisation

Did the claimant suffer detriments because she raised a protected act - a written complaint of discrimination in a formal grievance to the Respondent?

423. We did not agree that the claimant suffered any of the detriments because she had done a protected act.

424. The reason why all of these acts occurred was because a decision had been made to dismiss her; the respondent was not going to change its mind, she was off sick until her date of dismissal.

425. All claims of victimisation therefore fail and are dismissed.

Unfair Dismissal

What was the reason (or, if more than one, the principal reason) for the Claimant's dismissal? The Respondent contends that the reason (or principal reason) for dismissal was a fair reason under section 98(2), namely redundancy.

426. For reasons outlined above we did not accept that the respondent is able to prove that the claimant's position was redundant. There was no evidence of a reduction in the work for underwriters, or a reorganisation which lessened the need for a junior underwriter.

427. We considered that the use of redundancy was retrofitted onto a pre-existing decision to exit the claimant.

428. It follows that the respondent has not proven the reason for dismissal, and it is accordingly unfair.

429. As stated above, we consider that the reason for dismissal stems from a decision taken by Mr Llewelyn that her conduct merited dismissal, a decision we conclude was an act of direct sex discrimination.

Jurisdiction

Did any of the acts of direct discrimination relied upon by the Claimant occur more than three months before the date on which the Claimant submitted her claim to an Employment Tribunal (extended, as necessary, by ACAS conciliation)?

If so, do any such acts form part of "conduct extending over a period" for the purposes of section 123(3) of EqA 2010, and was the claim brought within three months of the end of that period (extended, as necessary, by ACAS conciliation); and

If not, should time be extended to "such other period as the employment tribunal thinks just and equitable" under section 123(1)(b) of EqA 2010?

430. The tribunal concluded that the act of discrimination relating to the claimant's dismissal amounted to a continuing act, encompassing the dismissal and exit-related events from 8 February 2019 to the date of dismissal.

431. There are acts which predate this – one-off events in late 2017 and 2018. These were not part of the continuing discrimination – the dismissal related acts and events.

432. We concluded that it was just and equitable to extent time for these earlier acts, for the following reason: the respondent's reliance on 'similar' type' acts of the claimant during a similar time period as both justification for her dismissal, and to rebut the allegations of the claimant. Accordingly, her personality, her actions, her behaviour from 2017 onwards were being used to justify the respondent's actions.

433. Given this, we felt that it was reasonable – just – to allow the claimant's evidence and allegations on events in the same time-frame to be addressed and adjudicated on.

434. There was no detriment to the respondent in doing so: it was able to mount a case in response, making direct allegations against the claimant in doing so.

Case management discussion

435. A separate notice will be sent out for a one-hours case management discussion to deal with issues relevant to remedy.

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EMPLOYMENT JUDGE EMERY

Dated: 12 August 2022

Judgment sent to the parties
On: 12/08/2022

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For the staff of the Tribunal office

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