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EMPLOYMENT TRIBUNALS

Claimant: Mrs R S Kushimo

Respondents: (1) Union Bank (UK) Plc
(2) Union Bank of Nigeria Plc

Heard at: London Central **On:** 5 – 13 June 2017

Before: Employment Judge Auerbach

Members: Ms T Breslin
Ms L Jones

Representation

Claimant: Ms L Prince, Counsel

Respondent: Mr A Ohringer, Counsel

REASONS

Introduction

1. The Claim Form was presented on 28 April 2016. The complaints were originally of unfair dismissal, direct and indirect sex discrimination and, in the alternative to direct discrimination, harassment related to sex. There was an initial case management Preliminary Hearing (PH) followed by a further PH to determine issues of international jurisdiction.

2. The context is that the Second Respondent (which we refer to as UBN) is a Nigerian bank. The First Respondent (which we refer to as UBUK) is a UK bank and a subsidiary of the Second Respondent. The Claimant's relationship with one or other of the Respondents, or both of them, fell into three phases. First, between 20 May 2010 and 10 August 2014, she was working based in Lagos, Nigeria. It was common ground in the litigation that she was employed by the Second Respondent during that period. Then, from 11 August 2014 to 4 March 2016 she was based in London. There was a dispute as to which of the Respondents employed her during

that second period or whether it was both. Finally, from 5 to 31 March 2016, she was instructed to report for work in Lagos for the Second Respondent, although, because of a dispute at the time, she did not do so. However, it was common ground in the litigation that during that period she was employed by the Second Respondent. That came to an end when she resigned on, and with effect on, 31 March 2016.

3. Arising from the previous PH, the Tribunal had held that there was no international jurisdiction in respect of matters occurring during the third period, but that there was no such obstacle in relation to claims concerning matters said to have occurred during the second period. That decision therefore led to some narrowing of the issues, and this was reflected in the agreed list of issues recorded in the minute of a further case management PH that then took place on 31 October 2016.

4. That list of issues was discussed at the start of the present hearing on day one and, after the Tribunal had completed its reading and before we heard the first witness, there was also further discussion at the start of day two. It was agreed that the Claimant was, during her time in London, in an employment relationship in the sense meant by the Employment Rights Act 1996. The dispute was as to whether that employment relationship was (as the Respondents claimed) with, and solely with, UBN, or whether it was (as the Claimant claimed), with UBUK, or possibly (the Claimant's fall-back position) with both Respondents jointly.

5. Ms Prince, for the Claimant, accepted that if we found that she was *not* an employee of UBUK, then her unfair dismissal claim against that company must fall away. Mr Ohringer, for the Respondents, confirmed that if, however, we found that she *was* employed, and then dismissed, by UBUK, then UBUK contended that this was a fair dismissal for capability and/or conduct and/or some other substantial reason. The Claimant's case was that UBUK had not shown a fair reason, or that in any event this was not a fair dismissal in all the circumstances.

6. On day two, the Tribunal raised an issue regarding the framing of the indirect discrimination claims, as both PCPs asserted by the Claimant were said by her, in terms, to have been applied *to women*. After a break, and an opportunity to take instructions, Ms Prince withdrew the indirect discrimination claims and we dismissed them upon withdrawal.

7. As for the other complaints under the Equality Act 2010 (of direct discrimination or harassment), the Respondents maintained that, if the Claimant was not employed by UBUK, then those claims faced an obstacle of lack of territorial jurisdiction. The Claimant disputed that. The Respondents accepted, however, subject to the territorial jurisdiction point, that the discrimination/harassment claims could lie against either Respondent, if it was her employer, and, if UBN was her employer, then against UBUK as the principal in a contract-worker relationship.

8. There was also, however, a time issue. The Respondents accepted that the unfair dismissal claim would be in time, and that if the decision to recall the Claimant to Nigeria amounted to unlawful discrimination, then the claim in relation to *that* would be in time. However, there were possible time

points in relation to the other discrimination and harassment claims, depending on the Tribunal's decision in relation to them.

9. The Equality Act claims were in any event defended on their merits.

10. As to remedies, should any relevant claims succeed, the Respondents contended that there was conduct on the part of the Claimant, which would have a bearing on compensation for loss of employment, either applying the principle that lawyers know for shorthand as *Polkey*, or applying the principle that lawyers know for shorthand as *Devis v Atkins* (and/or their analogies in relation to discrimination claims). Mr Ohringer confirmed, however, that they did not argue that there should be any reduction for what is commonly referred to by lawyers as contributory conduct. There were also issues, should the Tribunal get to that stage, as to whether the Claimant had made reasonable efforts to mitigate her loss of remuneration.

11. It was agreed that we would initially hear, and then decide together as necessary, all liability and jurisdictional points. If there were *Polkey* or *Devis v Atkins* type points that we felt able fairly to address as part of our liability decision, we would also do so; but we might refrain at this stage if we considered it fair to allow further representations, or that further evidence might be required. We would in any event not deal, as part of our initial decision, with general issues of mitigation.

12. We had a three-volume bundle to which some additions were made during the course of the hearing. There was also a mitigation bundle, but we did not need to consider this at present. The witnesses from whom we had statements were the Claimant, and, for the Respondents, Dr Adekola Ali, Janet Ntuk, David Forster and Kandola Kasongo. Mr Ali was not called to give evidence in person and it was agreed that we would attach such weight to his statement as we thought fit, bearing in mind that there had been no opportunity to cross examine him.

13. We had written and oral submissions from both counsel and were referred by them to various authorities. Within the time allocated to this trial, we were able to deliberate and come to our decision in chambers. We then delivered an oral reasoned decision on the last hearing day. The written judgment was then promulgated. Written reasons were also requested and these are now provided.

The Facts

14. As we have noted, UBN is a Nigerian bank of which UBUK is its UK subsidiary. UBUK was, historically, a branch of UBN, but, following changes in UK banking law in 2003, it was established as a separate UK limited company, subject to the UK banking regulatory regime. UBN is a substantial bank with branches throughout Nigeria. It has about 2600 direct staff and uses about 2400 contractors. UBUK is a much smaller operation with about 40 plus staff. UBUK's client base is mainly sourced from Nigeria and links with UBN.

15. In July 2010, the Claimant started work at UBN in Lagos. There was a letter of offer of employment of 20 May 2010 and then a contract of service.

That contract indicated that the service was intended to cover any place in Nigeria where the Bank is or may be established. Clause 4, headed "Official Not to Engage in Any Other Business" provided:

> It is hereby agreed that you shall not without the written consent of the Bank first having obtained at any time during the continuance of your employment under this agreement engage or be engaged or be concerned directly or indirectly in any other business or occupation whatsoever either as principal, agent, servant or otherwise but will devote the whole of your time and attention to the business of a Bank and will use your best endeavours to promote and extend the same.

16. Clause 6 provided that the Claimant would be entitled to join the Bank's pension scheme as applicable to all permanent staff. Clause 11 provided:

> With the sanction of your Manager or Head of Department, you may keep a current account with the Branch of the Bank at which you are employed, if a branch staff, or in any branch in the town in which you are located, which current account you shall not overdraw without the prior sanction of your Manager or Head of Department. You shall not open or maintain any account with any other Bank without the sanction of Management.

17. In 2012 the Claimant was promoted to the position of Senior Manager. In November 2013, following a competitive interview process, the Claimant was announced as a replacement for a member of staff, Mr Tijjani Baba, who had hitherto been seconded to UBUK. Janet Ntuk, Associate Director, Corporate Resources at the UK Bank – effectively its HR manager – informed a colleague of this news in an email. This included the observation that "we will need to start now to process her visa to work in the UK. … Roli is single and will be relocating to the UK alone, so there will be no issues re a spouse's transfer or children."

18. On 23 January 2014 Ms Ntuk emailed a colleague in the UBN HR team in responses to his queries about aspects of how the secondment of the Claimant would work. She attached a copy of a Secondment and Training Agreement of 2006, made between UBN and UBUK. She referred him to that agreement in case he had not seen it. She noted that this referred to a secondment letter, which she commented, would form the Claimant's "contract of employment" [she placed that in inverted commas] while she was in the UK. It would detail her remuneration and benefits, reporting line and duties, and would be issued after the UK board had approved her appointment and total remuneration. The work visa application would thereafter be submitted. Ms Ntuk also addressed other logistics.

19. The secondment agreement included, at clause 2.2, headed "Status of Secondment":

> The relationship of the Secondee to [UBUK], will be that of secondee. Nothing in this agreement will render the secondee an employee of [UBUK] and the secondee will remain throughout the term an employee of [UBN].

20. Clause 3.2, headed "Scope of Services", provided:
> During the Term, it is agreed by the parties that [UBUK] shall have exclusive control over the secondee and instruct the secondee in all matters relating to the

Services. The Parties acknowledge that the secondee may from time to time also be required to undertake tasks for the benefit of the Group.

21. Clause 3.4 provided that before commencement of the secondment, UBN would if requested by UBUK, agree any variation to the contract of employment, and, if requested by UBUK, procure that the secondee sign a letter agreeing to variation of the contract, and procure that the secondee consent to the future amendment of the contract as amended by the secondment letter on the ending of the secondment.

22. Clause 3.5 concerned pay reviews and promotion, including provision that during the Term the Remuneration Committee (a committee of UBUK) will "at least once in each calendar year review the salary of the Secondee" and that UBN "will consider the Secondee's eligibility for promotion or a pay review as if the Secondee was still working under the Contract of Employment before it was varied" pursuant to the Secondment.

23. The governing law of that agreement was stated to be English law and the parties submitted to the jurisdiction of the English courts.

24. During January and February of 2014 the directors of UBUK gave consideration to the Claimant's proposed secondment. One of the directors, Asue Ighodalo, indicated in an email that his inclination was not to support the choice of the Claimant. The matter was then considered at a board meeting on 4 February 2014. The minute included the following:

> On the new incoming seconded officer it was agreed that her performance was to be reviewed and reported to Board on completion of one year in office. It was also mentioned that in the first year of deployment it would be helpful for the Committee to seek quarterly reports on the new officer's performance.

25. The proposed financial package was also considered by the UK board and ultimately agreed, and it gave its blessing to the secondment proceeding. This was conveyed by Ms Ntuk to Emeka Emuwa in an email of 11 February 2014. He was the Chief Executive and Group Managing Director of UBN, but also seconded by it to chair the board of UBUK. He replied: "Ok. Please proceed".

26. From all the evidence we had about this phase of matters, we found it was recognised, within the senior echelons of both UBN and UBUK, that the Claimant was not as fully qualified for the role as she ideally might be, in particular because of her lack of experience in corporate banking. However, within UBN it was considered that she had other strengths, and that her selection struck the right balance between the need to support UBUK and the need to retain appropriate qualified corporate staff to support UBN through its own restructuring at that time. On considering the Claimant's CV, some UBUK board members had reservations about her suitability, as we have described. Ultimately, however, it was agreed to accept her secondment, but on the basis that it would be kept under review.

27. There followed steps to obtain a visa for the Claimant, and further consideration of details of her terms and conditions while on secondment. There was correspondence between Ms Ntuk and a colleague in the HR

Team at UBN in March 2014. This included the colleague stating: "We propose to include that her local pension contribution will continue to be remitted to her pension fund administrator while reimbursement is received from UBUK." Ms Ntuk replied "we will table this at the forthcoming E & RC Board meeting in April, so that the appropriate approval can be obtained – it was not part of the Board's approval received in February but this would be the right process to adopt as pension contributions are not paid to ex-pats in the UK – this is normally a provision that continues in the 'home country'."

28. On 18 March 2014 the Claimant was written to by Union Bank of Nigeria plc, Human Resources Department. The letter was signed by the then Head of Human Resources of UBN and one of its heads of Commercial and Retail Banking. It was headed: "Secondment to Union Bank UK." It began:

> We are pleased to advise that following the selection process carried out by the bank, management has approved your transfer to a new post within the UBN Group. Your new posting is in the United Kingdom (UK), where you will take up the position of Director, Institutional & Commercial Banking at Union Bank UK (UBUK). The posting will be for five years.

29. Reference was made to arrangements being under way to obtain a UK work visa. "Other details and requirements on your new role will be made available to you before your arrival in the United Kingdom." The letter also stated: "Details on your new compensation and applicable benefits will be made available to you in line with the compensation policy in UBUK." The Claimant was told that relocation expenses would be paid for her, including an air flight for herself, spouse and up to four registered children and other relocation costs. Under "Home travel and leave" it provided: "UBUK will bear the cost of return air tickets to Nigeria (Business Class). Your annual leave entitlement will be subject to the leave policy in UBUK." Clause 4, headed "Status", provided: "Your current grade in UBN will be retained in records and changes in compensation and promotion will be noted for your file and all relevant benefits associated with the status at any point in time will be enjoyed upon your return."

30. A visa was obtained for the Claimant via the so-called Tier 2 route. This allowed for an initial three-year visa with a possible extension of two years, therefore to a maximum of five years.

31. During the course of July 2014, the Claimant had exchanges with Kandola Kasongo and Ms Ntuk about various practical impacts of the secondment on her remuneration and financial arrangements. Mr Kasongo was an Executive Director and Chief Risk Officer of UBN and he had particular responsibility for oversight of secondments of this sort. In an email of 9 July, the Claimant raised issues about the implications for the mortgage loan that she had from UBN, and allowances that had been paid to her, as well as other matters. The allowances were elements of her remuneration package with UBN, of which it had paid the whole annual amounts in advance at the start of the year, so that potentially, they fell to be pro-rated on her move to the UK, with some repayment of part of that advance due from her.

32. On 25 July 2014 the Claimant forwarded that email to Ms Ntuk, asking her to liaise with the relevant member of HR in Nigeria. In her reply, Ms Ntuk

began: “Don’t feel bad. Even though you are being seconded to the UK you remain an employee of UBN and the custom and practice is that staff on secondment should not be put in a position whereby they are worse off as a result of their secondment.” [emphasis in original] The Claimant however replied that she felt worse off and could not understand why she was being treated as though she had resigned, as “I am still a staff of the Parent company.”

33. As a result of further exchanges an arrangement was reached in relation to all these matters, and the Claimant emailed Ms Ntuk to inform her of this on 31 July. This included agreement in relation to continuing mortgage arrangements, and that the prorated advance allowances that had to be repaid, would be repaid by instalments.

34. Meantime, on 23 July 2014, a letter was issued to the Claimant from Union Bank UK plc. This was signed by Dr Adekola Ali. He was the Managing Director and CEO of UBUK, but himself a secondee from UBN. This letter was headed “Your Inter Group Secondment to the UK under the Tier 2 Migrants Scheme.” It began: “I am pleased to confirm details of your secondment to Union Bank UK plc …”. It set out the Claimant’s salary and benefits and how these were broken down, that her reporting line would be to him, matters to do with healthcare, annual leave, relocation allowance, kit allowance and payroll arrangements, as well as training arrangements. The Claimant countersigned this letter on 11 August 2014.

35. Meantime, on 1 August 2014, the Claimant further copied in Ms Ntuk on exchanges she had had with Mr Kasongo regarding her benefits. Ms Ntuk replied, beginning: “Thank you. At least you are being treated as a member of staff on transfer and not a member of staff exiting the bank which is progress.” She continued: “The challenge in the UK for ex pat staff as well as locally recruited staff, is the ‘pay as you earn’ tax system …” and she went on to explain aspects of how that would be handled.

36. The Claimant travelled to the UK on 10 August 2014 and started work in London on 11 August 2014 as Director, Institutional & Commercial Banking. The “Director” in her title was an indication of her grade and seniority. She was not a company law or board director of UBUK.

37. During her time in the UK the Claimant was paid by UBUK in sterling and under PAYE, but was exempt from National Insurance in year one, under a reciprocal arrangement between the UK and Nigeria. She was also told that she could benefit from something called overseas work day relief, whereby payment of remuneration to her in respect of time spent in Nigeria or otherwise outside the UK would not be subject to UK tax; and she was given access to advice from accountants KPMG on that matter. From when she started work in the UK she reported to Dr Ali.

38. As mentioned, the chairman of the board of UBUK was Mr Emuwa. He was a UBN appointee, being the Group MD of UBN and based in Lagos. Also on the Board of UBUK as a UBN appointee, was Mr Kasongo, the UBN Chief Risk Officer, also based in Lagos. They came to the UK every three months or so for meetings of the UK board and relevant board committees. The CEO of UBUK was David Forster. He reported to Dr Ali.

39. On 13 November 2014 there was a meeting of the Credit and General Purposes Committee (C & GPC) of UBUK, chaired by a director, Marco Biglia. Mr Kandolo was present and Mr Emuwa was in attendance. The Claimant presented the business performance review for the third quarter of 2014, and questions were asked. At one point the Claimant was questioned about concerns with progressing "account on-boarding" – getting new business implemented. She said that difficulties were not due to internal issues but a regulatory matter. Mr Emuwa however took issue with this explanation, as he considered that all banks faced the same issue.

40. Further on, the Claimant introduced the strategy and presented an executive summary. Comments recorded included Mr Emuwa stating that he "felt that the retail strategy was too broad and does not entirely make sense". Further on, Mr Emuwa and a colleague, Mr Laws, were recorded as questioning the Claimant as to what was to be done about the corporate and commercial banking strategy, as her presentation stated that the focus was to remain in corporate and commercial banking. Mr Laws also questioned if UBUK had the skill set or personnel to implement this strategy "as he sees that this is something that is still be built on and not proven as yet." Action points at the end of the minute included for the Claimant to produce "a better articulation of resources on the Retail & Rep Office strategy."

41. UBUK had an audit team whose functions include oversight of compliance with regulatory requirements and the bank's own procedures. They would periodically pick up issues of concern and embody these in so-called snap checks or other audit reports. Sometime in late 2014, the audit team picked up on concerns about certain transactions carried out by the Claimant's team in October of that year. They had some exchanges with the Claimant about them in which she accepted responsibility for these matters having occurred on her watch. Subsequently, in February 2015, they issued a snap checks report which included references to these matters as "major discrepancies." They concerned clients that we can refer to as JML and TI.

42. In relation to JML, there was a concern identified that the bid bond – that is, the facility being made available to this client – had been issued without risk management review. This was identified as being a breach of section 3.1 in the lending manual. The Claimant also signed to accept responsibility concerning the transaction with TI, where it was identified that a draw down was approved without risks sign off, and other criticisms were made.

43. This same report also referred to a matter concerning a client which we can refer to as PI, whereby a loan facility advanced had not been at the Bank's usual rate, but at a lower rate. Audit expressed the view that the credit committee that had signed off on this loan was not exempt from criticism.

44. On 12 February 2015 there was as meeting of the C & GPC. This included a note by a non-executive director, Gavin Laws, that during the previous board meeting, management had indicated that a number of deals had closed and expected to be drawn shortly, but this had not occured as expected. There was also some discussion of the matters that audit had

identified. "The committee discussed the breaches to the credit policy, including the lack of legal documentation pricing decisions without ALCO approval and disbursements without risk sign off. [Mr Laws] stated that staff that breached the rules should be disciplined. [Mr Biglia] indicated that the bank had to be protected and that UBUK had to become stricter in all respects. The independent directors requested that the MD circulate a memo to all staff to express the Board's dissatisfaction with the breaches of policies and procedures."

45. Further on, the Claimant presented the business performance review for the fourth quarter. Mr Biglia "stated that the numbers were not good and asked which actions were being taken to improve the performance."

46. On 17 February 2015 a note was circulated to all staff in UBUK by Dr Ali, headed: "Compliance with Policies and Procedures of the Bank". It began: "Following discussions at its meetings on 12 and 13 February 2015, the Board of Directors requested me to remind all staff that you are expected to comply with the Bank's Policies and Procedures in force at all times."

47. In late February or early March 2015 the Claimant informed Ms Ntuk that she was about to become a mother through arrangements with two surrogate mothers in Nigeria. She wanted to take a month's leave to coincide with the expected births. She was concerned as to whether she would get that amount of leave so soon. Ms Ntuk told her that she did not think it would be a problem and to simply apply using the electronic leave system. We accepted Ms Ntuk's recollection that this conversation did indeed occur in late February or early March. Hers was clearer than the Claimant's recollection that it had been some time earlier, and a later email supports Ms Ntuk's recollection, as it refers to this as a sudden request. We accepted from Ms Ntuk that she understood that the Claimant had only revealed this matter to her at this time, prior to the births, because she needed to explain why this request was important to her. Ms Ntuk did not at this time tell Dr Ali about these particular circumstances.

48. On 2 March 2015 one of the surrogate mothers gave birth to four children.

49. On 6 March 2015 Dr Ali and Mr Forster met with the Claimant to follow up on the matters raised in the audit report affecting her. This was followed by an email from Mr Forster to the Claimant attaching copies of the audit reports that had been seen by the Audit Committee. He wrote that while she had previously accepted the auditor's comments, "you should now give a full and detailed response to these findings, especially where you feel that the case has been misrepresented. [The auditor] will have the opportunity to review and either accept or disagree to your response. If his findings remain unchanged as a result of your submission, then these will be the basis for any subsequent disciplinary meeting."

50. The Claimant's application for leave had been made and granted, and later on 6 March 2015 she travelled to Nigeria. Whilst there she arranged to meet UBN's Head of HR, Miyen Swomen. She told him about the births of the babies, who where then still in hospital, and the surrogacy arrangements. His reaction was supportive. He told her that she should register the babies under the UBN health scheme to ensure that they got

the necessary health care. He also said that UBN would support her in her plans to move the children to the UK at some point, and that if necessary she should let UBUK know that UBN would guide them in this regard. There was no detailed discussion of the mechanics of such matters.

51. On 20 March 2015, whilst still in Nigeria, the Claimant called Ms Ntuk and told her of the births. Following this, Ms Ntuk sent the Claimant a warm congratulatory email.

52. On 13 April 2015 the Claimant returned to the UK. She sent Dr Ali an email headed "Notice of Motherhood." She began: "I am by this email officially notifying you that I have become a mother." She went on to explain about the surrogacy arrangements and that she was awaiting the birth certificates that she would submit. Dr Ali replied: "Congratulations. This is very good news and I am happy for you. Very best wishes."

53. The matter of the Claimant's comments on the audit issues had been in abeyance during her absence. Upon her return Mr Forster emailed her: "We need this information so that we can bring this matter to a conclusion. Can you please let us have your response by close Wednesday?"

54. On 20 April 2015 the Claimant emailed Mr Forster and Mr Ali, copying in the auditor, Chris Nwabuoku, commenting on the audit reports. In particular, she described how the TI transaction was progressed before final risk sign off, as the client was being very pressing, when about to get on a plane to Dubai, for the transaction to be closed. She also addressed the issue of failure to recoup a facility fee in relation to the JML. She also queried whether action was going to be taken against the members of the credit committee in relation to the PI matter, or if not, why not.

55. On 21 April 2015 (the date on the birth certificate in our bundle), the Claimant's fifth child was born to the second surrogate mother.

56. Regarding the audit disciplinary process, the views and input of Dominiek Vangaever from Risk and Compliance were sought at this stage and Mr Nwabuoku replied to the Claimant's comments. The Claimant took issue with his stance. He provided a further document, headed "executive summary", in response to the further particulars that she had submitted and setting out his findings and conclusions in relation to those.

57. On 27 April 2015 the Claimant texted Mr Kasongo that she had become a mother. He replied offering her warmest congratulations, observing that he had not noticed, as he put it, any visible changes on her recent visit to Nigeria. She replied explaining that she had used a surrogate.

58. The Claimant further exchange emailed Mr Nwabuoku suggesting that his audit report was incomplete, either in error or deliberately. His reply reminded her that she approved all the final reports before they were published and had accepted responsibility for the two matters in question. He considered that his executive summary was complete and done professionally, and was not in error, deliberate or otherwise.

59. On 5 May 2015 Mr Forster emailed the Claimant: "I have now read Chris's comments and your subsequent emails. We should have a meeting tomorrow to finalise the matter, what time is good for you? Since, as advised previously, this is a disciplinary matter, you should be aware of the relevant section in the staff handbook and also note that, if you wish, you have the right to be accompanied to the meeting."

60. On 6 May 2015 Mr Forster met the Claimant. He made some notes of what he intended to say to her in terms of his main points, and, after the meeting, he made a note of the meeting itself, and then of the final finding and recommendation that he made.

61. Mr Forster's preparatory note included: "Chris has reviewed his findings in light of your comments, but has found nothing which alters his original view" and identifying that on two separate occasions she had finalised a loan transaction before sign off from risk. "This is a fundamental breach of known procedure and is in place to ensure that all documentation and AML checks have been completed before any disbursement under a facility. You must recognise that these audit reports are not only seen by the Board, but also by the Regulators who will see this as a clear indication that we do not have adequate controls in place."

62. Mr Forster indeed opened the discussion at the meeting along these lines. The Claimant's position was that in relation to only one of the two transactions had funds been advanced before risk sign off, maintaining that, in relation to the other, the only issue concerned recoupment of the bank's fee. (Mr Forster's later note recorded her making this point, although he erroneously recorded her as saying that it was the TI transaction where sign off was not an issue, whereas she had said this in relation to JML.) The Claimant also again questioned why members of the credit committee had not been disciplined in relation to the PI matter. Mr Forster told her that this did not have the same significance as the other breaches. The Claimant's reaction was that it was being swept under the carpet.

63. Mr Forster indicated that he would go back to the auditor one more time. Having done so, his finding was that in relation to *both* matters the bid bond or facility had been issued to the customer before sign off from risk, that this was a deliberate breach, although he understood that it was done due to the pressure exerted to meet deadlines. He recommended that the Claimant be issued with a final written warning.

64. That recommendation was signed off by the audit committee. Mr Forster then drafted a letter of outcome, issuing a written warning, and sent it to Ms Ntuk. She replied that it should be issued not by him, but by the MD/CEO. "This is because Roli is not an employee of UBUK. She is an employee of UBN. The correct line would be for the MD/CEO to issue the written warning and for Roli to have the right to appeal the decision to the Board."

65. On 8 May 2015 there was a meeting of the board of UBUK. Mr Emuwa and Mr Kasongo were among those present. The Claimant joined the meeting and there was a discussion of the concern of some of those present that too many low value accounts were being opened. The Claimant said she did not entirely have control over walk-in accounts being opened in this way.

Action points were recorded, that walk-in customer account opening was to be stopped "and Roli Kushimo to concentrate on trade finance and corporates until a retail strategy was clear."

66. Further on, the matters raised by audit were also discussed and Mr Forster reported that disciplinary action would be taken on the TI and JML matters, but "as it involved staff seconded from UBN it would have to be dealt with by KA." Ms Ntuk joined and explained this to the meeting.

67. On 12 May 2015, the warning letter was issued by Dr Ali. It referred to the audit investigations, the findings that there had been facilities advanced without sign off by risk in both cases, and Mr Forster's recommendation. Dr Ali upheld that recommendation and the letter issued a first and final warning which it said would last for 12 months. "You should note that any further procedural lapses of this kind will have serious consequences which will result in the determination of your engagement in the UK Bank (but not your UBN employment), and should therefore be avoided at all costs." The Claimant was informed of her right to appeal which should be addressed to the Chairman of the Board and would be dealt by the Chairman.

68. The Claimant's evidence was that she spoke to Ms Ntuk, who told her that there was no point in appealing, as the appeal would be dealt with by the "same people" and the outcome would be no different; and made the point that the warning would only last 12 months. In cross-examination, the Claimant somewhat modified that, saying that Ms Ntuk had said the appeal would be heard by people from the same group.

69. Ms Ntuk, in cross-examination, denied having advised the Claimant not to appeal. Her evidence was that she had been to see the Claimant to give her the warning letter personally, and the Claimant had then read it over. Ms Ntuk told us that she was sure she would not have told the Claimant that there was no point in appealing, because she was an experienced HR professional, and the Claimant did have the absolute right to appeal. We found that evidence consistent with the careful advice Ms Ntuk had already given colleagues, about the proper protocol in relation to the issuing of the warning and the identification of the appropriate route of appeal.

70. We accepted that Ms Ntuk did draw to the Claimant's attention that the warning would be expunged after 12 months, but not that she told her that she could not appeal, or that there was no point. It was clear to us that the Claimant did, however, feel that there was no point in appealing, because she considered that managers from the same group would be involved at both stages, and the outcome would be no different.

71. Sometime in early May 2015, the Claimant went to see Ms Ntuk and requested maternity leave with a view to going to Nigeria. Ms Ntuk advised her that maternity leave was something available only to birth mothers and that the bank had no specific policy covering someone who had acquired children through a surrogacy arrangement. UBUK does have a provision in its handbook concerning *parental* leave, but Ms Ntuk considered that this was intended to cover biological and adoptive parents, not to cater for the Claimant's position; and in any event the Claimant had yet to supply documentation confirming that she had acquired parental responsibility. Ms

Ntuk told the Claimant that she could certainly request to take some extra leave, but that whether to grant this would be at the company's discretion.

72. Following that discussion, the Claimant put in her request. On 13 May 2015 she emailed Dr Ali, copying in Ms Ntuk, with the heading: "Request for 20 working days on compassionate grounds". She asked for 20 working days' leave on compassionate grounds outside of the 9 days' annual leave that she had in hand. She wrote that this was "highly needed to enable me attend with pressing needs at home in respect of my new born kids" and that, if approved, she would take 15 days effective from the first week of June, utilising the balance "at a later date based on needs."

73. On 14 May 2015 Dr Ali and Ms Ntuk discussed the matter. Ms Ntuk then emailed the Claimant, beginning: "Your application for leave on compassionate grounds is under review. Your application states that you require the time off to attend to pressing issues for your new born children. To enable the Bank to come to a fair decision on the matter, mindful that any decision taken will form a precedent on which other applications within the Bank can be based, is it possible for you to submit a copy of the official documentation on the births in addition?" She added that this would also assist her in reviewing whether new entitlements coming into force in relation to surrogacy from 5 April may have an impact.

74. Early on 21 May 2015 the Claimant emailed notification of birth and birth certificates to Ms Ntuk, who replied that she would revert as soon as possible. However, the Claimant then looked at the certificates, saw an issue relating to the use of her maiden name, and emailed Ms Ntuk again that morning, that she would be taking that up with the hospital. Ms Ntuk replied that same morning: "At least your name is there and we also know you as Roli S Kushimo (nee Alatan) so no problem on the Bank side – but I have met with Dr Ali on the documentation and will need to discuss further with you." She proposed to see her later, following meetings.

75. Some time after that, the Claimant had a discussion with Ms Ntuk, following which Ms Ntuk emailed Dr Ali on 27 May 2015, headed "Transfer of Roli's family to the UK" as follows:

> As we are responsible for ensuring the smooth transfer and relocation of our expat staff, this also includes members of their family. Roli has informed me that she is working towards bringing over her children to the UK so that all her family can be with her in one location for the remainder of the 4 year term plus that she has in the UK and she has sought advice on the best way to approach this.
>
> In view of the circumstances, I have contacted our immigration lawyer (no charge for this) but as he needs to investigate the best way to do this, there will therefore be a cost to bank for such advice which I will establish up front. I am therefore alerting you to the position and that I will revert with the estimated cost. It is advisable that we take proper advice on the matter as our original application submitted for Roli's work permit stated that there were no dependants – as that was the position some 18 months ago when we made the application. I will revert again shortly.

76. Ms Ntuk the same day forwarded that email to the Claimant for her information. The Claimant replied: "Also, UBN says if UBUK needs its

support or assistance in this regards that we should let them know." Ms Ntuk replied, also the same day: "That is great. I will revert as soon as possible – unfortunately nothing is free here!"

77. Ms Ntuk had a further email exchange with Dr Ali at the end of that same day. He wrote "

> 1 As discussed some days ago when you came to my office to discuss the birth certificates received, another matter to resolve is the surrogacy matter. I do not consider the birth certificates submitted by Roli on their own adequate for the bank to give formal recognition to the surrogacy. I expect that a legal surrogacy document is required to support. We may need legal advice on that as well.
>
> 2 In addition, it will help to know how Union Bank, her primary employer is treating this. You may have to contact the UBN HR Department about it.

78. Ms Ntuk replied:

> Yes, you are correct and I should also have given you an update:
>
> (1) Roli was asked to supply the information that same day and said she would do – the agreements are awaited.
>
> (2) She also confirmed that she had supplied the same documents given to us to her employer in Nigeria when she notified of the surrogacy. They advised her that they had noted the births.
>
> I will follow up on (1) above and will revert once the documents are received."

79. Pausing there, it is clear from these email trails – and the Claimant accepted this in evidence – that she was told by Ms Ntuk that the UK Bank did, in addition to the birth certificates, also need to see the relevant surrogacy agreements.

80. On 11 June 2015 the Claimant emailed Ms Ntuk the amended birth certificates and notification of births and told her to disregard the previous documents. On 12 June, she supplied Ms Ntuk with the surrogacy agreements.

81. The Claimant had, meantime, arranged a business trip to Nigeria with colleagues, for which she had obtained approval from Dr Ali. She flew that same day, 12 June 2015, to Lagos. She was due to return on 28 June, but whilst in Nigeria she contacted Dr Ali and asked to take the 9 days' annual leave that she had outstanding in order to stay on, in particular to deal with applying for passports for the children. He granted that application and she indeed stayed on in Nigeria after the end of June. During that period, she embarked on applying for the passports, but the process proved to be fraught with difficulty and she was not able to complete it.

82. The Claimant's first day back in the London office was 10 July 2015. On that day she saw Dr Ali. Her account of their conversation, in her witness statement, was as follows:

> I went to Adekola Ali's office to let him know I had returned from Nigeria. After narrating my experience in Nigeria at the Immigration Office to him, he told me that Emeka Emuwa, the Group Managing Director, had called and asked after me. I found this odd at the time because even when Emeka was in UBUK passing by or on his personal visits to London, he never asked after me. I only ran into him by chance or at meetings. To use Ali's exact words he said "…I told him you were in Nigeria doing your own thing, that you were processing passports for your children." He then said that Emeka told him that he did not know that I had children, but he could not see how I could cope and that they should transfer me back to UBN."

83. Dr Ali's account of this conversation, and his prior conversation with Mr Emuwa, in his witness statement, was as follows:

> In the summer of 2015, Emeka Emuwa, the Chief Executive Officer and Group Manager Director of the Second Respondent, visited the UK subsidiary of the Bank. During his visit, Mr Emuwa came to my office and we had a conversation. During this conversation Mr Emuwa asked after the Claimant. I told him that at the time the Claimant took leave and was in Nigeria sorting out matters in relation to her children. I recall that Mr Emuwa was surprised at this and commented that he did not know the Claimant had had any children. This, in turn, was a shock to me, because, as I explained to Mr Emuwa, the Claimant had informed me that she had informed the Second Respondent of the birth of her children, which made me believe that he was aware. Upon the Claimant's return to the office, I had a conversation with her. During this conversation, I informed the Claimant that Mr Emuwa had enquired after her and I informed her of my response and Mr Emuwa's surprise at not having knowledge of the birth of her children. The Claimant then informed me that although she had informed the Second Respondent, she had not informed Mr Emuwa personally. I made the point to the Claimant that she should ask out of courtesy and informed Mr Emuwa that she had become a mother.

84. He continued:

> I did not at any point say to the Claimant that I had told Mr Emuwa that she was 'off doing her own thing.' I would be most unlikely to describe the trip in those terms either to Mr Emuwa or in recounting the conversation to the Claimant. Similarly Mr Emuwa did not say to me at any stage, either in that conversation or subsequently, that the Claimant should be recalled to Nigeria because she would not combine the responsibilities of being a mother with her role for the First Respondent. It is also unthinkable I would make such a statement to the Claimant because it would obviously be something that could be used against the First or Second Respondent if the Claimant was unhappy with them.

85. When cross-examined before us, the Claimant maintained that her recollection was very clear, and went over her account again. She said that Dr Ali was uncomfortable during the discussion, looking at the floor and not at her. The account Dr Ali gave her of his conversation with Mr Emuwa included that he had told Mr Emuwa that she was in Nigeria "doing her own thing, processing her children's passport applications" and that Mr Emuwa had then indicated that he did not know about the children. Dr Ali had then asked the Claimant: "didn't you tell him about the children" and she had replied that she had told others in Nigeria, but not thought that she needed to tell Mr Emuwa. Dr Ali had then referred to his understanding that she had been told that London should refer to Nigeria on the subject of relocation of her children; she told him that *that* was a conversation with *Mr*

Swomen. She told us that Dr Ali had then commented that Mr Emuwa did not see how she could cope, and that she "needed to return" to Nigeria.

86. We had to come to a view, doing our best on the evidence available to us, about what had occurred in Mr Emuwa's conversation with Dr Ali and in Dr Ali's subsequent reporting of it to the Claimant.

87. Mr Ohringer submitted that the Claimant was not a reliable or credible witness on this subject. In her particulars of claim and original witness statement, she had the date of her conversation with Mr Ali wrong, giving it as 2 July and only correcting the statement following disclosure of her holiday records. So, he suggested, her recollection of other aspects was also likely to be unreliable. He also submitted that there were notable differences in the accounts that she had given of her conversation with Dr Ali, at different subsequent stages. Ms Prince noted that we had no evidence at all from Mr Emuwa. She submitted that we should attach little or no weight to the statement of Dr Ali, who had not been presented for cross examination. So, the Claimant's account should be accepted.

88. We bore in mind that Dr Ali's account had not been tested in cross examination, but with that caution we felt that his statement still contributed *something* to the overall picture. We did not think that the Claimant's error about the date of the conversation undermined her account. We accepted her evidence that she simply made a mistake about it, because she did not have her travel records to hand initially (she referred to computer problems) and then readily corrected it when shown records plainly identifying the correct date. She was consistent in saying that the conversation had taken place on her first day back at work, and Mr Ali's own account was consistent with that. We also accepted, having heard her cross-examined, that her overall recollection of the encounter with Dr Ali remained good, and that it had stuck in her mind because it had troubled her.

89. As to later accounts, that given in the Claimant's solicitors' letter before action (to which we will come later), included that Mr Emuwa was reported as having questioned whether she could cope, but not that he had said she would need to be recalled. However, an email which the Claimant herself sent Mr Swomen, on 3 March 2016 (to which we will also come), which she copied to, among others, Mr Emuwa himself, *did* allege that Mr Ali had reported that Mr Emuwa had said that he would transfer her back. We also considered that the accounts that she had given at different times were otherwise substantially consistent.

90. From all the evidence available to us, our further findings were as follows.

91. First, the context was that Mr Emuwa's visit to the London office occurred at a point when the Claimant's business trip was over, but she had, at fairly short notice, stayed on in Nigeria. At that point, Dr Ali was fully conversant with the fact that she had acquired five children by surrogacy and that she had stayed on, in particular, to attempt to progress passport applications for them. Further, Dr Ali also, by this time, understood that when she had previously been out to Nigeria, she had spoken to someone at UBN about her wish to bring the children to the UK at some point.

92. Given that context, it entirely made sense that, when Mr Emuwa enquired of Dr Ali as to the Claimant's whereabouts, Dr Ali assumed that Mr Emuwa knew about the children, as such, but only did not know that she had stayed on in Nigeria in connection with them. But it then became immediately apparent that Mr Emuwa did not know about the children at all. Again, it was not hard to believe that this would have caused them both some surprise, and Dr Ali some embarrassment. It also made sense that Dr Ali then put Mr Emuwa more fully in the picture. It seemed to us implausible that he would have done so without mentioning the number of children involved. The story was an unusual one, and the facts of the Claimant acquiring five children in Nigeria, through surrogacy, and the attendant bureaucratic complications, would have been a natural part of the telling.

93. Further, it seemed to us entirely plausible that Dr Ali would have said to the Claimant, in *their* conversation, words to the effect that he had told Mr Emuwa that she was "doing her own thing", in the sense that she had stayed on beyond the end of the *business* trip to deal with *personal* matters to do with the children. We therefore accepted the Claimant's recollection that he had used that phrase *to her*, although we did not think that necessarily meant that he had used precisely those same words *to Mr Emuwa*. That is because this may simply have been Dr Ali's way of describing to her, in shorthand, what he had explained to Mr Emuwa. Either way, we found that he had explained to Mr Emuwa what she was doing, in more detail than merely saying that she was doing her own thing.

94. What of the Claimant's account of what Dr Ali told her had been Mr Emuwa's response to him? We accepted that Mr Emuwa had said (and Dr Ali had reported him as having said), that he, Mr Emuwa, did not see how she could cope. We also accepted that he raised the question of how this might affect her secondment. It seemed to us entirely plausible that this would have been Mr Emuwa's immediate reaction to being told that she had just acquired responsibility for five children in Nigeria, and was there at that very moment dealing with matters relating to that situation.

95. As we have recorded, Dr Ali's witness statement disputed that account. However, the overall picture we had was that Dr Ali was somewhat annoyed that he had been embarrassed by the Claimant not having put Mr Emuwa in the picture; and that he, Dr Ali, thought that the Claimant had also been unwise not to have done so, given Mr Emuwa's ultimate power over her. That was consistent with her account of Dr Ali's discomfiture during their discussion and his suggestion (on her account) that she should have told Mr Emuwa, at least as a courtesy.

96. We were not persuaded that Mr Emuwa conveyed to Dr Ali (or Dr Ali in turn to the Claimant) that he, Mr Emuwa, had decided, in terms, that the Claimant should now be recalled – rather, he was prompted to raise that *possibility*. It seemed to us that if Mr Emuwa had actually, at this point, taken the firm decision that the Claimant should return, it would have been actioned much sooner than in fact occurred and Dr Ali would have reported it to the Claimant in a different way. The Claimant's own description of how she behaved following this conversation with Dr Ali – effectively getting on with her work in London and not raising the subject herself, was consistent

with her being given to understand that the spectre of her being returned had been raised, rather than that a decision to do so had been taken.

97. In summary, while we could not be sure what precise words were used, we concluded that Mr Emuwa expressed his concern to Mr Ali that he could not see how the Claimant could cope with having acquired five children in Nigeria, and that this caused him to question whether her secondment should continue. What the Claimant took away from her conversation with Mr Ali, was that she was at risk of being recalled, and that it was, above all, Mr Emuwa, who needed to be kept happy about her continuing in her London role. This picture also fitted into the wider context in which her original appointment had not been without reservations or misgivings, either in Lagos or in London, and in which matters had not been going entirely smoothly for her in the first few months in the role.

98. Following the Claimant's return to the UK, neither she, Ms Ntuk, Dr Ali or anyone else raised the subject of compassionate leave, nor the subject of her wishing to bring the children to the UK at some point, again.

99. During August 2015, the Claimant had exchanges with HR in Nigeria in which she sought to progress matters to do with UBN's healthcare cover. She was told that the maximum number of children who could be covered was four, and that it had transpired that her details were previously given to an old healthcare provider used by UBN, but had not been passed on to the new provider. The final details passed on by the Claimant in these exchanges, included those of herself, and four of the five children.

100. On 9 September 2015 an appraisal of the Claimant for the first six months of 2015 was completed by her and Dr Ali. This showed her achieving overall scores totalling 58 out of a possible 100.

101. On 26 November 2015 there was a meeting of the R and GPC of UBUK. Attendees included Mr Kasongo. In a review of matters arising from the previous meeting, the note included: "RK to present her proposals regarding terms and conditions deposit rates and minimum balances for customers to management - Not Actioned." The Claimant was also recorded as presenting the business performance for the third quarter of 2015. In discussion Mr Law commented that it would be difficult to maintain profits in the fourth quarter, given that the balance sheet and off balance sheet figures were shrinking. The Claimant referred to deals in the pipeline, but Mr Kasongo expressed concern that the pipeline list contained may oil companies and that there was concentration of risk. There was also a further discussion about whether sufficient had been done to ensure that only accounts which resulted in significant balances were opened.

102. On 2 December 2015, UBN's Head of HR, Miyen Swomen, emailed the Claimant a letter. This was on UBN notepaper and under the names of Mr Swomen and Mr Kasongo. It was headed: "End of Transfer and Return to Union Bank Nigeria." It read:

> We are pleased to advise that in line with recent discussions held with you in connection with the end of your assignment in Union Bank UK ("UBUK"), you have been recalled back to the home office, Union Bank Nigeria plc ("UBN"), with effect

from January 4th 2016. Consequently your term of duty in UBUK will end on December 31st 2015.

You are expected to report to the Head, Human Resources for further discussions and details regarding your new assignment on resumption at UBN plc.

In line with the terms and conditions of your recall from secondment, your current grade (Senior Manager) will be retained at your home office along with the compensation benefits for the grade. Please find attached details of your compensation entitlement.

Please note that your transfer benefits and inconvenience shall be processed on your return.

Kindly ensure that you properly hand over details of your current duty to the designated replacement, Roli Kushimo. [*sic*]

We would like to thank you for your services at UBUK and wish you the best in your new role.

103. A remuneration schedule was attached to the letter.

104. Also on 2 December 2015, Miyen Swomen emailed Dr Ali: "Good evening Dr. Please the attached is for your attention and action." Attached was a letter (mis)dated 4 December to him, as follows:

We refer to our previous letter dated March 18, 2014 regarding the secondment of Roli Sola Kushimo to Union Bank UK plc.

Please be informed that management has approved the recall of Roli Sola Kushimo to Union Bank Nigeria with effect from January 4th 2016,

Consequent on her recall to the home office, her term of duty at Union Bank UK will terminate effective December 31st 2015.

105. It had been known for some months that Dr Ali was himself to be recalled to Nigeria, but it took some time to identify and appoint a replacement for him. However, around this same time in December, he was himself notified that his recall was going ahead. He in due course returned to Nigeria in January or February of 2016, to be replaced as Chief Executive of UBUK by another UBN secondee, Maurice Phido.

106. A couple of days before these two recalls were formally notified, Mr Forster had a call from Mr Laws. Mr Laws was then the chair of UK Bank's Audit Committee, but was shortly to become the chair of the UK Bank itself, in succession to Mr Emuwa. Mr Laws told Mr Forster that the Claimant was about to be recalled and that Dr Ali's anticipated recall was about to be actioned as well. We accepted Mr Forster's evidence that he had not known prior to this call, that the Claimant was about to be recalled, and that he and Mr Laws did not have any particular discussion about why this was happening.

107. On 3 December 2015 Dr Ali told Ms Ntuk about the notification he had received of the Claimant's recall. This was the first that she knew of it.

108. The Claimant began to make arrangements for her return to Nigeria, including contacting the agents in connection with her London home, and KPMG in relation to the tax implications. She spoke to Ms Ntuk, who emailed Dr Ali on 10 December 2015. Ms Ntuk explained that the Claimant was signed up on her lease until mid February and was therefore facing a financial exposure through terminating on short notice, and raised an issue about the Claimant's final return ticket to Nigeria. Dr Ali replied: "Individual accommodation arrangement is a personal responsibility. However, since her recall is at the instance of UBN she may take up any issues arising due to the recall, with Lagos."

109. Following further communications with Ms Ntuk, the Claimant emailed Mr Swomen on 10 December 2015. She explained that she remained liable for rent until April 2016 and asked: "Please advise on how to treat."

110. The Claimant also sought advice from specialist immigration advisers, *The London Link*, about options to enable her to stay on in the UK. On 11 December 2015 they wrote her an advice letter setting out various options. These included the route of applying for an entrepreneur's visa, for which evidence would need to be provided of investment and business activity, including access to funds for such activity, of, depending on the source and nature, either £200,000 or £50,000.

111. On 14 December 2015 the Claimant emailed Mr Emuwa and Mr Kasongo, headed: "Appeal for Financial Support." She wrote that she was one of the best branch managers at UBN, and referred to the steps that she had taken, following her secondment, to relocate herself to the UK. She had received the 2 December letter after spending just a little over a year out of the five-year posting. "I am surprised that no one called me before and after I received the letter to explain why I had been abruptly recalled, however, I do not question the Bank's judgment but would have greatly appreciated prior and timely communication to prepare me for such unsettling sudden relocation and possible areas of improvement on my performance." She referred to how her life had been dislocated and the problems with her lease. She concluded: "I humbly ask that you look into my plight and await your positive response to enable me to alleviate the unplanned sudden expense this recall to Nigeria has brought about."

112. On 15 December 2015 Mr Kasongo acknowledged that email, saying that they hoped to revert in a day or two. In the meantime, the Claimant confirmed to Ms Ntuk her intention to travel to Nigeria on 31 December. On 16 December, the cost of shipping her effects was approved.

113. Then, on 16 December 2015, Mr Swomen emailed the Claimant, in response to her email to Messrs Emuwa and Kasongo of 14 December; "Relocation to Nigeria notice has been extended to 3 months and a revised letter will be emailed to you in due course, please note that the Bank will also support your relocation in the Country with hotel accommodation in line with policy in order to give time for home search as necessary."

114. This notification was forwarded to Ms Ntuk, and in turn to Dr Ali and Mr Forster. The latter responded: "I assume this is up to the 2nd March?" The former responded: "This is very good and considerate."

115. The Claimant indicated to Ms Ntuk that notwithstanding this extension, the shipping arrangements in place should go ahead.

116. On 23 December 2015 Mr Swomen spoke to the Claimant, following which she sent him two emails. The first read: "Your telephone call to me this morning refers. In line with your email of 16 December I will use my three (3) month notice period." In the second, she wrote "As stated earlier, I will do the three (3) months notice as that is the proper and professional thing to do, despite that fact that my life has been dislocated without explanation. I need to advise my customers, including the ones I signed on and the ones I manage as well as my colleagues. The focus should be on what portfolio to offer me when I return."

117. Immediately following these exchanges, the Claimant went off sick and went to see her GP complaining of stress and anxiety. She attempted, it appears, to come back into the office on 30 December, but was then off sick for a further period in January.

118. Having considered the email chains and the Claimant's own account of it, we found that, in his call to her on 23 December, Mr Swomen told the Claimant that they did not, after all, want her to spend a further 3 months in the London office, but to come back to Nigeria imminently. The Claimant was however insistent that she should work out that notice period and that she could be trusted to do so professionally. We found that she was, however, extremely distressed by this call because she felt that, having granted her more time, UBN was now attempting a volte face. We also accepted that she told Mr Swomen that she really now needed to speak to someone in UBN other than him about her situation, but that she declined his suggestion that she speak to Mr Emuwa, as he had not, as she saw it, seen fit to speak to her, before recalling her.

119. From 1 January 2016, Mr Laws took over as Chairman of UBUK. Mr Phido took over from Dr Ali as MD/CEO some time in January or February.

120. The Claimant was off sick until around the end of the first week of January.

121. On 11 January 2016, Mr Forster emailed Miyen Swomen, seeking confirmation that her return date would be 2 March. Mr Swomen replied that he would speak to Mr Kasongo and Mr Emuwa.

122. In February 2016 the Claimant's appraisal for the whole of 2015 was completed. She achieved an overall score of 62.5 out of a possible 100.

123. On 25 February 2016 the Claimant's solicitors, Williams Hortor, wrote to Mr Laws, copying in others at UBN. They referred to prospective claims against both banks for breach of contract, relating to her secondment, and unlawful sex discrimination and what they called associative pregnancy discrimination. They asserted that the secondment was for five years with no provision for early termination, and so the recall letter of 2 December was in breach. They wrote that the Claimant had been subjected to discriminatory treatment by her employer, UBN, and that UBUK thus was liable as principal within the meaning of section 42 Equality Act 2010. They

wrote that the Claimant had notified becoming a mother in March 2015, and in May her wish to work towards bringing her children to the UK. They wrote that, upon her return from a trip to Nigeria on 2 July 2015, the managing director had told her that he had said she was off doing her own thing and processing international passports for her children. He had reported that the Group MD commented that he did not know that she had children and that "he did not see how our client could cope". They asserted, further on, her contention that the decision to recall her was taken shortly after she had notified her employers that she had become a mother.

124. On 1 March 2016 Mr Swomen wrote to the Claimant that they would be responding to her solicitors' letter. He continued: "Please be advised that the instruction given in December 2015 for you to relocate back to Nigeria has nothing to do with any of the issues raised in the letter from Williams Hortor including the issue of surrogacy." He referred to the 3-month extension and stated that: "Based on the extension granted, you are required to resume in the office in Nigeria on Monday 7th March 2016." The instruction to relocate still stood and therefore the UK subsidiary had been told that the secondment would end on Friday 4th March 2016.

125. The Claimant replied on 3 March 2016, copying in Ms Ntuk, Mr Forster, Mr Fido, Mr Kasongo and Mr Emuwa. She wrote:

> Contrary to your comments it has everything to do with it, the birth of my daughters.
>
> I was in Nigeria on official assignment towards the end of June 2015. Upon completion of the assignment I called Kola Ali 2-3 times to ask for his consent for me to take some days from my annual leave to enable me to process my daughters papers, he consented … a total of 4 days was taken and I returned to work on 2 July 2015, went to his office just to let him know I had returned. After telling him my experience in Nigeria, he then said Emeka Emuwa called and asked after me, using his exact words … I told him you were in Nigeria doing your own thing and that you were processing passports for your children. He said Emeka told him he did not know I had children. Kola then told me he thought I said I told Miyen and repeated my conversation with you (Miyen), which took place in your office on the day you considered my request for a meeting with you, where I announced the arrival of my children, where you were told there is no policy on surrogacy in UBN it is a new thing in Nigeria, however, we (Miyen) would do exceptional approval, we (Miyen) need to register the children under UBN HMO, the children have to move to join you in the UK, if UBUK does not what to do they should communicate with you Miyen to guide them. I told Kola yes that is correct.
>
> I then told Kola that, when my kids were born I notified UBUK HR, I notified him as my MD, I sent KK a text and also when KK came for Board meeting I told him again.
>
> Kola then said, Emeka says he would transfer me back to UBN but he did not see how I would cope.

126. The Claimant continued that no-one had told her the reason behind the abrupt recall. She warned of a Tribunal claim if the matter could not be resolved, and referred to having been victimised and recalled because she had not been prepared to cover up irregularities and issues.

127. The Claimant's last day working at UBUK was 4 March 2016. However on 7 March she did not attend for work in Lagos.

128. On 16 March 2016, solicitors for both banks, Mayer Brown, wrote to Williams Hortor. They said that the secondment was for "up to" five years, as per the letter of 23 July 2014, and that the Claimant's initial response to being recalled was to accept it. They denied the claims of discrimination. They stated: "The decision to require your client to relocate back to Nigeria was taken partly on the grounds of your client's performance and partly on the basis of the availability of what is believed to be a more suitable role for your client." They referred to final written warning and the matters behind that. They continued: "Thereafter, the concern was that your client did not appear to be working effectively in the seconded role. At the same time a role became available in Nigeria for her, which the Bank felt matched her skill set more precisely. Accordingly, the decision was taken to locate her back to Nigeria to take up that role." They continued that the Claimant was required to return to Nigeria to take up her post; and they flagged up jurisdictional issues with her threatened claims in England.

129. On 18 March 2016 the Claimant's visa was cancelled.

130. In an email on 29 March 2016, Mayer Brown wrote that they hoped that the Claimant would confirm her return to take up her role in Nigeria. They continued: "Your client has been aware of the role for a number of months now, and so has had full opportunity to ask any questions about the role. However, we confirm that the role in question is Group Head Commercial in Ikeja 2. There is no loss of benefits or income." It would be a senior role managing commercial teams.

131. On 31 March 2016 Williams Hortor wrote stating that the Claimant would assert that she was at all times an employee of UBUK plc, maintaining the breach of contract and discrimination claims and that the termination of the secondment had been abrupt and with no notice. The suggestion that it was because of performance issues was vigorously disputed and they questioned a supposed role having now been identified for her in Nigeria. The letter concluded that the Claimant was entitled to terminate her contract with UBN without notice, by virtue of UBN's conduct towards her which constituted a repudiatory breach and a wrongful dismissal; and they stated her intention to proceed with claims against both banks.

The Tribunal's Further Findings and Conclusions

Who employed the Claimant during her time in London?

132. It was common ground that, during her time in London, the Claimant had a contract of employment. The issue was whether her contract with UBN continued, but on the basis that she was deputed to work for UBUK, or whether her employment with UBN ceased, to be succeeded by employment with UBUK (or – Ms Prince's fall-back submission – co-employment by both companies). We had to decide what was the effect of the relevant documents and/or other aspects of how arrangements operated, or were implemented. What did these show that the parties, whether expressly or impliedly, had agreed?

133. We were referred to a number of authorities. One particularly relied upon by Ms Prince was **Fitton v City of Edinburgh Council**, UKEATS/0010/07, 5 June 2008. There, the claimant was seconded by the local authority to another body, ELLP. Subsequently it was agreed that the secondment would be permanent and indefinite and the claimant expressly relinquished her post with the Council, on the understanding that it would guarantee her a position, should the secondment end. The Tribunal's conclusion that she was employed by ELLP was upheld by the EAT. Given those findings, this outcome in that case seems to us unsurprising. We could not see that this decision established any particular proposition of law, or otherwise cast any light on the appropriate outcome in the present case.

134. Ms Prince also relied upon the fact that, during her time in the UK, a number of functions relating to the Claimant's employment were carried out, or managed, by UBUK, rather than UBN. However, whilst the carrying out of one or more employment-related functions by a given company may be reflective of the fact that it has become the employer, this is not necessarily or automatically so. That is because it may be carrying out such functions under delegated authority or power given to it by the actual employer. See: **Wittenberg v Sunset Personnel Services Limited**, UKEATS, 0019/2013, 21 November 2013. Mr Ohringer made the general submission that, for reasons of practicality and convenience, such arrangements are in fact a very common feature of a true secondment. Be that as it may, we had to consider not just who carried out which functions, but whether, in this case, this was done under expressly or impliedly delegated authority.

135. In this case, as we have recorded, a secondment agreement between UBN and UBK made provision for delegation to UBUK of, amongst other matters, determination of pay and other responsibilities. Although the Claimant did not see that agreement and was not a party to it, it casts some light on the capacity in which UBN and UBUK intended that UBUK should be acting.

136. The key documents are those to which the Claimant was a party. They must be construed according to their terms, but set in their wider context.

137. Ms Prince reminded us that the labels used by parties are not, by themselves, determinative, but, she of course accepted, they may be relevant, and indicative of their intentions. Further, in this case, there was no reason in principle why the parties could not have opted for a true secondment, rather than a change of employer. As we have recorded, the letter from UBN of 18 March 2014 was headed, in terms, "Secondment to Union Bank UK." This is highly significant. This was a key formal letter, issued by the HR Department of UBN. It of itself tends to suggest that UBN was communicating to the Claimant a conscious decision that this would be a secondment in the legal sense. The fact that the Claimant was told, in this letter *from UBN*, that certain matters would be dealt with by it, and others by UBUK, with details to follow, was also consistent with her being notified by UBN of an element of delegation of functions, in particular, the determination of remuneration whilst in the UK, to UBUK.

138. The clause at the end of the letter, headed "Status", was also consistent with secondment. That is because it not merely contemplated her return to

UBN, and addressed the question of her status on return, but explained that changes in compensation and benefits attaching to her grade "at any point in time" – which must mean, during the course of her time in the UK – would be "noted for your file" and "enjoyed upon your return".

139. The letter of 23 July 2014 came from UBUK. But it, too, in its heading, referred to the Claimant's "Inter Group Secondment". Further, it began by explaining that its purpose was to confirm "details of your secondment", and its content was reflective of the fact that determination of the Claimant's remuneration package, and other matters, had been delegated to UBUK to decide. This letter, was, in short, reflective of what the earlier letter from UBN had told the Claimant would happen.

140. In short, the natural meaning of what these two letters conveyed to the Claimant was, indeed, that this was, in law, a secondment arrangement in law, and not a transfer, or change, to employment by UBUK.

141. However, were there other indicators present that were so powerful as to demonstrate that these letters did not represent the true understanding or agreement between the parties, or otherwise showed that the Claimant had, *de facto*, become a UBUK employee? Alternatively, were there others that reinforced the picture of secondment?

142. As we have recorded, there was an email chain between 9 and 25 July 2014, therefore spanning the period during which the second of the above two letters was written, in which the Claimant herself commented that she was "still under the employment of UBN" and Ms Ntuk also commented that she remained an employee of UBN (and indeed underlined this). Although the Claimant replied that she felt that she was being treated like staff who had resigned, her point was that she was not, in fact, such staff, which was why she felt she should be treated better. While these emails would not, themselves have determined, or altered, the true relationship, they seemed to us to be indicative that the two letters not merely reflected the intentions of UBN and UBUK, but something that was understood, and indeed desired, by the Claimant as well.

143. Ms Prince suggested it was significant that the remuneration package changed, both as to overall amount, and as to the elements that made it up. However, we did not find this surprising, given that the Claimant was to be working a different country, under a different tax regime, and that she would be in a different local market environment in relation to remuneration, and alongside local colleagues paid in line with UBUK's own rates. It also simply made obvious practical sense for management of annual leave arrangements to be delegated to UBUK.

144. We did not find any of these features to be inconsistent with a secondment arrangement or to demonstrate that that was not truly what was agreed. Further, while the essentials of the Claimant's remuneration package were fixed in line with UBUK's local terms, there were, as we have described, elements that were peculiar to ex-pats from Nigeria, and she received, or was potentially entitled to, certain tax treatment that would not have been given to an ordinary employee of UBUK.

145. The Claimant was paid by UBUK, but we did not find that to be inconsistent with secondment status. In principle, there are (at least) two ways in which this aspect might be arranged. The seconding company can continue to pay the employee, in which case it will usually expect to receive some payment back from the host company. Alternatively, the host company can remunerate the employee directly, in which case no such payment back need be required. Once again, in a context where the Claimant was moving to a different country, and being given a remuneration package determined in line with local arrangements, and came, to some extent, within the purview of the UK tax regime, it seems unsurprising that UBUK simply paid her basic pay and benefits directly itself. Further, even here, was we have recorded, UBN remained responsible, in principle, for the provision of certain other benefits.

146. Ms Prince referred to the fact that UBUK not merely determined the Claimant's remuneration, but approved her proposed move to the UK. But that was not inconsistent with the arrangement being one of secondment. A proposed secondee cannot be foisted on a host that has not agreed to receive them. The secondment agreement between the two banks was an umbrella agreement, applicable to individuals who it was, in fact, agreed would be seconded. It was not suggested that it gave UBN the right impose individual secondees. But, by significant contrast – and we will return to this – all the signs were that the decision to *recall* the Claimant, bringing the secondment to an end, was something that UBN had the power to take unilaterally. Even though it might well be influenced by the views of UBUK directors, recall did not require the UBUK's formal agreement – a further indication that the Claimant was not its employee.

147. In relation to pension, it was a fact that during the course of her time in London, the UBN did not continue to make pension payments for the Claimant, but there was an issue before us as to why that happened. The Respondent's witnesses said that there were logistical problems, and that these applied not just to her but to all ex-pats, and had taken a long time to sort out. The Claimant challenged that. But whatever, precisely, was the explanation for why nothing was paid during her time in the UK, Ms Ntuk's initial exchanges with her counterpart in Nigeria clearly show that the background context was one in which UBN understood that it had an obligation to continue to ensure that the Claimant's pension was funded in one way or another. There was, we concluded, no evidence that UBN relinquished this responsibility, and ceased making payments, specifically on the basis that it considered her no longer to be its employee at all.

148. It was a fact that the Claimant was inducted in various of UBUK's practices and procedures, and issued with various standard policies and procedures, including, for example, signing its standard confidentiality undertaking. Ms Prince pointed to the fact that a number of these documents referred to the recipient or addressee as UBUK's employee, and, in the case of the confidentiality undertaking, contained reference to the position following the termination of employment.

149. However, it was perfectly clear that these were all standard issue documents. In the Tribunal's collective experience it would not be at all unusual in such a situation that such documents would be issued, and the

individual would be invited to sign them, without anyone perhaps even noticing or considering whether references to the "employee" were strictly correct, or, if they noticed, bothering to amend them. We had no evidence that anyone had applied their mind to this, at all. Nor was it surprising that the Claimant was expected to become conversant with, and follow, UBUK's local procedures, and observe confidentiality in relation to its affairs, as such. Neither the issuing of these documents, nor these features of their terminology, could be taken to be an indication that the Claimant was in fact intended to be an employee of UBUK, and not merely a secondee.

150. Similarly, the one or two references we were shown, in administrative documents issued by UBN, to the Claimant as being "ex staff", could not be regarded as significant. It seemed perfectly plausible that these might, for example, have simply been triggered by her coming off its payroll, or associated mechanisms. Certainly, we had no evidence that anyone had decided that she should be specifically re-designated in this way, because she had ceased to be UBN's employee.

151. Nor was it inconsistent with secondment that during her time in the UK the Claimant was appraised locally. Again, that simply made practical sense, since the work she was now doing related to the affairs of UBUK and was carried out and managed locally. Nor was it surprising that when the disciplinary issue arose the investigation and the recommendation coming out of it were handled by a local manager in the UK. Again, that simply made practical sense, and was consistent with that process being handled by delegated authority. Further, as we have recorded, when it came to the formal administration of the sanction, and HR were consulted, care was taken to ensure that this was done by a UBN secondee.

152. Our conclusion was that throughout her time in London the Claimant remained an employee of UBN and she did not become an employee of UBUK. There was a dispute before us as to whether joint employment would even have been possible as a matter of law. But we did not need to determine that legal question as, even if it was legally possible, we found no necessity or factual basis to infer joint employment in any event in this case.

153. Mr Ohringer rightly accepted that, even if, as we indeed found, she was not its employee, UBUK would still be liable to the Claimant in respect of any discriminatory treatment of her done by someone on its behalf. That is because UBUK was the principal in a contract-worker relationship for the purposes of section 41 **Equality Act 2010**. Specifically, the Claimant was doing work for UBUK during this period, by virtue of being supplied to it under an agreement between her employer (UBN) and UBUK.

154. Ms Prince, for her part, accepted that, were we to find, as we in fact did, that the Claimant was employed by UBN during this period, and *not* UBUK, the unfair dismissal claim against UBUK must necessarily fail, as such a claim can only be brought by an employee against their employer. The claim of unfair dismissal against UBUK was therefore dismissed.

155. The issue as to whether, for the purposes of any remedy, UBUK had complied with what would have been its duty to provide a compliance

statement of written particulars of employment also fell away, as that duty, too, would only have fallen on it, had it been the Claimant's employer.

Territorial Jurisdiction

156. We turn to the question of territorial jurisdiction.

157. A significant body of authority has built up in this area in recent years. We were referred, in particular, to: **Lawson v Serco** [2006] ICR 250 (HL), **Duncombe v Secretary of State for Children, Schools and Families** [2010] ICR 15 (CA), **Ravat v Halliburton Manufacturing Services Limited** [2012] IRLR 315 (SC); **R (Hottak) v Secretary of State for Foreign and Commonwealth Affairs** [2016] ICR 995 (CA), as well as other authorities.

158. The authorities establish that the question of whether there is territorial jurisdiction in a particular case, is fact sensitive, and turns, ultimately, on whether the circumstances of the individual concerned are such that Parliament is to be taken to have intended the legislation in question to confer protection on them. The authorities now establish that the same test is to be applied whether the claim is brought under the Equality Act or is one of unfair dismissal, under the Employment Rights Act, save that a more generous approach may be required in certain cases where the cause of action is underpinned by Community law.

159. The authorities also establish that where, over the course of someone's employment, the material circumstances have changed, the focus of the Tribunal should be on the circumstances that obtained at the time of the alleged treatment of which complaint is made, not merely, for example, on the circumstances when the relationship was originally formed.

160. In most (though not necessarily all) cases where the individual works, or at any rate, is plainly based, in Great Britain, during the period in question, the claim is likely to come within the territorial jurisdiction of the domestic Employment Tribunal. Unsurprisingly, most, although not all, of the appellate cases concern people who were not physically working, or based, in Great Britain during the relevant period. In all cases, however, the focus of the enquiry is on whether the employment has a sufficiently substantial connection with this country to be in scope of the legislation concerned. There can, potentially, be cases where, even though the individual is working, or based, here, that connection is nevertheless not sufficiently strong for the territorial jurisdiction test to be passed.

161. In the present case, we had no doubt that, throughout the relevant period (which fell within the second period referred to at paragraph 2 above), the Claimant was mostly actually working in London, and, certainly, though there were some overseas trips, was based there throughout. Further, notwithstanding that her secondment was not permanent – because it was always envisaged that she could and would be returned to Nigeria at some point, and because it had a maximum term of five years – nevertheless, in light of all our findings, it could not be said that this was a casual or brief visit to work in London. It was plainly more than that, and, for as long as the secondment lasted, London was her clear base place of work.

162. Mr Ohringer, submitted, however, that throughout the period of secondment, the ties of the Claimant's employment to Nigeria remained stronger, and the connection with Great Britain was not sufficiently strong for the Tribunal to have territorial jurisdiction in relation to her claims.

163. One factor that Mr Ohringer submitted was particularly significant in this case was the governing law of the Claimant's underlying contract of employment with UBN. The authorities show that this may, potentially, be a relevant consideration. In the present case, the Claimant's contract contained no express provision relating to this. However, Mr Ohringer submitted that, under Article of the Rome 1 Regulations, it was to be deemed to be Nigerian law.

164. However, even if that is right, the governing law of the contract is only one factor to be put into the overall factual mix; and even an express provision in a contract of employment as to its governing law, cannot, as such, displace, or by itself determine, the territorial jurisdiction of the Tribunal in relation to statutory claims. In this case, given that the Claimant's base had, during the relevant period, moved to London, and the findings we have already made about that, we did not think the governing-law of the contract to be a very significant factor in the mix.

165. More generally, Mr Ohringer argued that this was but one aspect of a picture which showed that the "centre of gravity" of the employment relationship was in Nigeria, given that she was ultimately under the control of UBN, that she received benefits which would only be accorded to someone whose "long-term base" was in Nigeria and that, during the period of secondment, she retained family and other ties in Nigeria, including that she did not sell her home in Lagos, but rented it out. However, once again, such features did not weigh very heavily in the scales, against the picture of the steps which the Claimant took, for example, to rent a home for herself whilst in London, and so forth, during the course of her secondment. She lived in London, was based in London, managed in London, and, albeit with some modifications, subject to the UK's PAYE regime.

166. In short, in light of all our findings, and standing back, we did not accept Mr Ohringer's depiction. Rather, we agreed with Ms Prince that the facts of the **Pervez** case [2011] IRLR 284 provided a striking analogy with those of the present case. In all events, we concluded that the Claimant's employment did have sufficiently strong connections to Great Britain, for it to fall within the territorial scope of the Equality Act. Accordingly, there was territorial jurisdiction to consider those claims.

Equality Act Claims

167. We turn, therefore, to consider the live **Equality Act 2010** claims. These were put primarily as being of direct discrimination, although, they were each also put in the alternative as being claims of harassment.

168. The relevant sections, or (parts thereof) of the 2010 Act are as follows.

13 Direct discrimination

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

23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

26 Harassment

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

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

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

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

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

(a) the perception of B;

(b) the other circumstances of the case;

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

(5) The relevant protected characteristics [include sex]

39 Employees and applicants

(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;

(c) by not offering 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;

(d) by subjecting B to any other detriment.

41 Contract workers

(1) A principal must not discriminate against a contract worker—

(a) as to the terms on which the principal allows the worker to do the work;

(b) by not allowing the worker to do, or to continue to do, the work;

(c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;

(d) by subjecting the worker to any other detriment.

(2) A principal must not, in relation to contract work, harass a contract worker.

…

(5) A "principal" is a person who makes work available for an individual who is—

(a) employed by another person, and

(b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).

(6) "Contract work" is work such as is mentioned in subsection (5).

(7) A "contract worker" is an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b).

123 Time limits

(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable. …

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

124 Remedies: general

(1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).

(2) The tribunal may—

(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;

(b) order the respondent to pay compensation to the complainant;

(c) make an appropriate recommendation.

(3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate—

(6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court or the sheriff under section 119.

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.
…

(6) A reference to the court includes a reference to—

(a) an employment tribunal; …

169. We considered the potential merits of the underlying claims first, as the position in relation to time points might be affected by that.

170. In considering these claims we reminded ourselves of a number of points emerging from many well-known authorities. Discrimination may occur though there are no obvious overt signs of it, such as the use of overtly sexist language. Unless an intrinsically discriminatory rule or practice has been followed, the Tribunal will have to consider what affected the mind of the alleged discriminator, whether consciously or sub-consciously. For a claim of direct sex discrimination to succeed, it is sufficient that was a significant or material influence on the decision: it does not have to be the sole or main reason for it. In evaluating such claims, particularly where there are said, as here, to have been a number of ostensibly distinct alleged incidents of discrimination, while the Tribunal has to adjudicate each individual claim, it also needs to stand back and view the bigger picture. Sometimes treatment which, viewed in isolation, might appear innocuous, looks more troubling when viewed in the context of a number of incidents. Conversely, an incident which might look troubling in isolation, appears more benign when viewed in a wider surrounding context.

171. We also reminded ourselves that section 136, concerning possible statutory shifting of the burden of proof, adds to, but has not displaced, the power of the Tribunal in an appropriate case to draw a common law inference of discrimination. Where, however, a claimant does rely on the statutory provision, there need to be sufficient facts, such that the Tribunal could make a finding of discrimination, absent an exonerating explanation. An inconsistent or untruthful explanation, can, potentially, support a common law inference or a shifting of the statutory burden.

172. We also reminded ourselves that where there is a dispute about whether the alleged treatment factually occurred *at all*, the Tribunal has to make a finding, on the balance of probabilities, as to whether the alleged treatment

in fact occurred, before, if so, going on to consider the potential impact of the burden of proof in relation to the claim relating to that treatment.

173. It was also accepted by Ms Prince that, in this case, the Claimant was not in the same position as a birth mother, who enjoys additional status and protection in law in respect of pregnancy and maternity. She did not enjoy any additional protection in her capacity as a mother who had acquired her children through a surrogacy arrangement. Ultimately, we had to decide whether the treatment complained of (to the extent that it, in fact, occurred) was, at least in some material contributing way, by reason of the Claimant's sex – the fact that she is a woman – or in the case of harassment, related to sex. This is a somewhat looser connector, but the existence of that connection is still an essential component of a complaint of that type.

174. There were some particular contextual or background matters which Ms Prince sought to rely upon in support of these claims in this case.

175. Reference was made to a chart showing a snapshot of the diversity profile of various grades of employee of UBUK as at 26 November 2015. Below the actual board, the most senior level was that of Director, of which, at the time, there were two men: Dr Ali and Mr Foster, and one woman: the Claimant. Next were Associate Directors, of whom there were four men and one woman: Ms Ntuk. Gradually, going down the ranks, the number of women increases, but it was not disputed that the Claimant was the first female employee at her level. UBUK accepted that Ms Ntuk was the only woman at her level at the time, although there had previously been a female chief risk officer between 2011 and 2013; and there had been a female non-executive on the board since September 2015.

176. However, we were impressed by the evidence of Mr Kasongo, who said that the organisation was very much alive to the lack of more women, the higher one went. He said that the gender profile was something they were in fact seeking to tackle at all levels. There had been a 50/50 quota imposed in a recent traineeships recruitment exercise. When the Claimant was seconded, he had highlighted to Ms Ntuk the fact that they had chosen a woman. Ms Ntuk's evidence was that the chart itself came into existence because it had been specifically produced to assist monitoring of these matters. Against that background, whatever else it might show, we did not think this gender profile leant any real weight to the particular claims before us, being of direct discrimination and harassment.

177. Ms Prince also referred to the way the Claimant had been described on occasion, in particular the use of the adjective: "pushy". The Tribunal certainly needs to be alive to the potential for ostensibly gender-neutral epithets to be used in a negative and sexist manner of women. In particular, essentially the same character trait may sometimes be deemed praiseworthy in a man, as reflected in a positive adjective, but deprecated in a woman, attracting a negative adjective. In that vein, Ms Prince provided us with an article drawing on research suggesting that the adjective "pushy" is used disproportionately as a negative descriptor of women. The Tribunal should certainly be alive to the possibility that the use of such a term may be a signpost that sexist attitudes are at work. But it does not follow that

the use of such a word is *always* to be taken as a sign that there is a general sexist culture in the workplace.

178. In the present case, the instances cited by Ms Prince, of uses of language which she said were signposts to underlying sexist attitudes, were extremely limited. In particular she relied on a passage in Mr Kasongo's witness statement, in which he commented that following the Claimant's secondment: "Some of the early feedback which was received, was that she was energising, but maybe too much. She came across as aggressive and pushy and there were clashes in terms of forcing the execution of decisions and making decisions herself which she did not have authority to execute."

179. Earlier on in his witness statement, Mr Kasongo wrote: "My first impressions of the Claimant were that she was aggressive, but in a good way: she had spirit and was dynamic." Reading his witness statement as a whole, and having also heard him give oral evidence, we considered that Mr Kasongo was speaking as he found, and recording the feedback that he had from others, but also giving his own balanced assessment of the Claimant's strengths and weaknesses. He also gave a thoughtful assessment in his evidence, of her assumptions as to how she would get on, moving into the UK bank. There was also some material in our bundle, for example, in the Claimant's early email exchanges Ms Ntuk, about her new role in the UK, to support the view that the Claimant did potentially have a rather plain-speaking approach to her dealings with colleagues.

180. Ms Prince also relied on a statement by Mr Forster, at one point in *his* witness statement, that the Claimant had "ruffled feathers", but again it seemed to us that this was, in the wider context of his evidence, simply him stating matters, in a simple idiomatic phrase, as he found them.

181. We did not find sufficient evidence here to point to a general sexist culture in the organisation. There was, in this particular case, no other evidence to support a wider picture of a sexist culture in this financial institution, such as the Tribunal still does, unfortunately, sometimes see in other cases.

182. Ms Prince also relied upon comments made in the email cited at paragraph 17 above, about the Claimant being single meaning that there were no complications associated with the need to move a family, as further reflective of sexist attitudes. But the context here was the practical fact that, where the secondee does have a family moving with them, the arrangements *will* be more complicated (whatever the sex of the secondee). Further, as noted, elswehere Mr Kasongo drew attention, in what was intended to be a positive spirit, to the fact that the secondee was a woman. Having regard to all of that, we did not think this particular passage in this email advanced the Claimant's case.

183. We turn to the individual claims of discrimination. We necessarily deal with each of these in turn, but our conclusions are also informed also by having stood back and looked at the bigger picture.

Disciplinary Procedure and Written Warning

184. Taking them in chronological order, the first complaints related to what was alleged to be singling the Claimant out for a disciplinary procedure in March 2015, and giving her a written warning.

185. We observe that this whole process was triggered by the activities of the audit officer. This was not something sought out by management. Further, the Claimant from an early stage accepted some responsibility and acknowledged that she was aware of what the members of her team had been doing. Further, it was clear that Mr Ali, in taking up the matter, and Mr Forster in his investigations, were both very much guided by audit. The Claimant was given the opportunity to make her representations and have her say, but the reaction and input of audit was sought at every stage. In light of all our findings of fact, we also accepted Mr Forster's evidence that he did regard the Claimant's conduct in relation to these matters as serious, because he considered that it involved a deliberate breach of procedures that were both important and had potential regulatory implications. Pausing there, on its face, there appears to be an entirely cogent and non-discriminatory explanation here for the treatment: namely the view taken of the gravity and implications of the matters in question.

186. However, probing further, the Claimant and Ms Prince pointed to a number of factors which they suggested pointed to gender being a factor. Firstly, the Claimant said that in relation to JML, the only issue was a failure to recoup a fee, which was not so serious, but was a purely commercial matter; and that Mr Forster's note of his interview with her had mixed up which matter this was. She submitted that the further note that came from the auditor subsequent to this seemed to accept this point.

187. However, Mr Forster gave cogent evidence, both in his witness statement and under cross examination, that he did not read the follow up audit comments that way, because audit had not changed the underlying report. That Mr Forster indeed took that view was reflected in the contents of the disciplinary decision that he drafted. We found that he was conscientious in seeking the auditor's further comments and input and in considering what the Claimant had to say; and we also found that his genuine overall conclusion was that there *had* been a deliberate breach by allowing this transaction to proceed before proper sign-off from Risk. Mr Forster acknowledged the realities of what the Claimant had said about the pressure she was under from the client but his stated view was that it was precisely the point that such pressures should not be allowed to undermine procedures, and that this was therefore not a sufficient excuse.

188. That this was indeed Mr Forster's view was also lent credence by Mr Kasongo's evidence that it was also his view that this was a basic and serious breach; and his observation that in a conversation that he had with the Claimant, while she had accepted responsibility, she did not seem to fully understand this. This evidence could be seen as self-serving, but it seemed to us entirely plausible, given the regulatory context, and this in turn suggested that Mr Forster's professed view was not particularly remarkable or singular.

189. The Claimant also maintained that the issue, by Risk, of something called an availment ticket, was sufficient sign off, but Mr Forster explained cogently in evidence, why, in his view, it was not, and she was wrong to think so. Again, the issue for us was not ultimately which of them was right, but whether we accepted that this was Mr Forster's genuine view, and what light this cast on what had or had not (consciously or not) influenced his decision to recommend the disciplinary sanction. Having heard him cross-examined we accepted that the whole reason he did so, was because he considered the Claimant to be guilty of conduct serious enough to warrant it. We found nothing in the matter itself to suggest the Claimant's sex was a factor in this treatment, whether consciously or otherwise.

190. Did consideration of the comparators that the Claimant sought to rely on cast any doubt on that conclusion, by providing further insight as to whether sex may have been, or was, a factor in her treatment? Those mentioned in the Claimant's evidence went beyond those identified in the formal particulars as comparators, but we considered all of them in any event.

191. First, the members of the credit committee (including Dr Ali and Mr Forster) were relied upon as comparators. They had approved a particular buy-to-let mortgage loan to the client concerned at a rate of 5%, not the usual 6% for transactions of that sort. The Claimant's case was that approving this transaction at an underrate was a serious dereliction by them. She told us that Mr Ali had told her that he had not checked the small print before signing off on it, which, she said was a serious matter in itself. Yet they were not sanctioned in any way. We were invited to infer that they were treated more leniently, because they were men, than she was, as a woman.

192. The Respondent's case however was that at the end of the day, this was a matter of negligence, and a commercial matter with no regulatory implications. Further, there was an element of shared responsibility, because the Claimant herself, in presenting the transaction for consideration, should have flagged up the unusual rate being applied in this case, even though it was apparent from a consideration of the paperwork.

193. We understood that the Claimant no doubt felt it was unjust that there was no sanction on the credit committee particularly when this matter was covered in the same report that concerned other matters in respect of which she was sanctioned. But we considered that the features relied upon by the Respondent were indeed salient differences which served to explain why the members of the credit committee were not sanctioned in relation to this matter. There was no basis for inferring that the fact that they were men had any influence on how they were treated, or that the handling of this matter cast on any light on how she was treated being influenced by sex.

194. Secondly, reference was made to Farhood Hieydary, the UBUK Treasurer. The Claimant said that he had caused the bank to sustain a loss on bond transactions. Mr Forster's evidence was that the matter to which the Claimant was referring concerned investments in a bond the value of which fluctuated over time. A snapshot at a particular point in time showed the value having fallen below the amount invested, but no actual loss was realised, because the bond was held for longer and ultimately the value rose again. So, he said, there was no reason ultimately to discipline Mr

Hieydary in relation to this investment. We accepted Mr Forster's account of that matter, and did not think there was any sufficient similarity between the facts of that matter and those in relation to which the Claimant was disciplined to cause us to suspect, or infer, that the difference in sex may have had something to do with the difference in treatment.

195. The Claimant also referred to Dominiek Vangaever, the Chief Risk and Compliance Officer of UBUK. He, she said, was criticised not only by her but by others for being incredibly slow at processing risk assessments and lacking an understanding of the business side. The Claimant gave an example of a transaction for someone introduced by Dr Ali, which Dr Ali himself complained was processed very slowly. Again, we were invited to infer that Mr Vangaever went unpunished, because he was a man.

196. The very matters for which the Claimant was disciplined arose out of the tension between her function and the Risk function, for which Mr Vangaever was responsible, and it appeared to us that the feeling that he had got an easier ride than her, in relation to his own failings, therefore particularly rankled with her. But any issues in relation to Mr Vangaever were potential performance issues not potential conduct issues; and we did not find sufficient similarity for consideration of his case to be illuminating of whether the Claimant's treatment involved discrimination.

197. Mention was also made of Martin Uzus, who had failed to collect a facility fee on a transaction; but again this was a commercial matter not involving a breach of procedures or a regulatory issue, and consideration of it did not assist the Claimant's case.

198. Des McElroy was said by the Claimant to have authorised fraudulent transactions, by allowing funds to be advanced when there were visible warnings of danger. Mr Forster gave a cogent account of what had happened here. There was a systems failure because the warning was not visible on the screen as it appeared on the default display, but was only visible if one pro-actively scrolled down. For this reason, two people had failed to see the warnings, not just Mr McElroy. We concluded that, on careful consideration, there was not in fact a real difference between the Claimant's account of what had gone wrong in this case and that of Mr Forster. This was not a case where there were no warnings at all – but the problem was that one had to scroll down in order to see them. Mr Forster's conclusion, we accepted, was that this was a combination of systems failure and/or negligence but *not* deliberate misconduct. Again, there was no sufficient basis to infer here that Mr McElroy had been treated more leniently because he was a man, or, hence, the Claimant more severely because she was a woman.

199. Our overall conclusion was that there was no treatment of the Claimant in relation to this matter because of sex, nor could it be said for the purposes of a harassment claim that her treatment was *related to* sex, which, as noted, was an essential ingredient of the alternative claim.

200. Regardless of time points, the claims in relation to this first matter therefore in any event failed on their merits.

Dr Ali's Remark

201. Next the Claimant complained of Dr Ali's remark that she was "doing her own thing" when on leave in Nigeria following the business trip.

202. It could be said that that phrase involved an element of trivialising or not taking sufficiently seriously what the Claimant was doing; but in light of our findings of fact, we concluded that this choice of phrase reflected that Dr Ali had explained that she had stayed on beyond the end of the business trip to deal with personal matters. This was a shorthand used by him to summarise to the Claimant what he had explained to Mr Emuwa; and, as we have found, he did give a more detailed account to Mr Emuwa than that.

203. We did not think there was sufficient on the facts of this case to infer that this phrase would or might not have been used by Dr Ali, had the Claimant been a man. There was not a sufficient prima facie case here and therefore the Respondents' failure to call Dr Ali to give evidence in person did not advance the Claimant's case. There was not sufficient to support a common law inference or to shift the burden of proof. Similarly, there was not sufficient for the purposes of the harassment claim, to support an inference or shifting of the burden on the question of whether this was conduct related to sex. These claims therefore also failed on their merits regardless of the position on the time point.

Mr Emuwa's Remarks

204. We turn to the complaints concerning the remarks of Mr Emuwa that he could not see how the Claimant could cope, and contemplating the possibility of terminating her secondment.

205. The Claimant did refer to an actual comparator here: Zaheer Ahmed. However, all we were told was that he was the Head of Finance and had become father to a new baby (and, by inference, had not been on the receiving end of similar remarks). But with such limited information about it, consideration of his case did not add anything of substance to our consideration of these remarks in relation to the Claimant.

206. As we have found, we considered it must be inferred that Mr Emuwa was generally put in the picture by Dr Ali regarding the Claimant having become the mother, through surrogacy, of five children born in Nigeria; and that she was at the time trying to sort out their passports in Nigeria. The hypothetical comparator here would therefore be a single man, based in the UK on secondment, and who had acquired responsibility for five new-born babies, presently in Nigeria.

207. Mr Ohringer submitted that the reaction, had Mr Emuwa been told that a male employee was in such a situation, would have been the same. It was entirely plausible that there would be an immediate reaction of expression of concern as to how someone in such an unusual and demanding situation would cope; and this would have equally caused Mr Emuwa to call into question the continued viability of the secondment of such a man.

208. We agreed with Mr Ohringer, in part, but only up to a point. We agreed that there would naturally be an immediate reaction of an expression of concern from someone in the position of Mr Emuwa, whether the employee concerned had been a man or a woman. But Mr Emuwa went further than that. He expressed the view that he could not see how she could cope and although he did not say that he was deciding then and there that she must be recalled, he gave a clear indication that this gave rise to a concern in his mind as to whether she should be recalled from her secondment.

209. We asked ourselves whether we could infer that he would have reacted in that particular way, if the other circumstances had been the same, but the employee concerned had been a man. The Claimant, when she was giving evidence, said she could understand the initial concern as to how she would cope, but suggested that what this should have prompted was an enquiry, to find out more about what she planned to do – what arrangements she planned to make for support with caring for the children and so forth, and generally how she planned to manage this change in her personal circumstances alongside her existing secondment. They should, at least, she said, have waited to see what arrangements she did make, and whether she did indeed manage to cope, before coming to such a strong view about the implications for her secondment.

210. We were mindful that it was not enough that the Claimant felt Mr Emuwa's reaction, and the failure to enquire of her about this matter, to be unfair; our focus was not on whether she was merely treated unfairly, but whether this treatment involved discrimination. Nevertheless, Ms Prince persuasively argued that the strength and immediacy of Mr Emuwa's reaction betrayed an implicit and unspoken assumption that she could not or would not take the steps necessary to manage the care responsibilities associated with the children, other than by taking that on personally herself, making her continued work role under the secondment untenable; and that underlying *that* was an implicit assumption that she would take on personally, rather than delegate, the caring role, because she was a woman.

211. We found this matter finely balanced. But we concluded that, given the overall content of what was said, and in the absence of any evidence *at all* from Mr Emuwa otherwise to explain this remark, it was to be inferred that his reaction, on the question of the potential implications of what he had been told for the secondment, was, materially, influenced by the fact that the Claimant was a woman. We concluded that the Claimant's sex was a material reason for this reaction, at least subconsciously, if not consciously.

212. Ms Prince invited us to draw an adverse inference, not only from the lack of evidence from Mr Emuwa, as such, but from the *unexplained failure* of Mr Emuwa to give evidence. We were troubled by the fact that we were indeed given no explanation for the failure to present *any* evidence from Mr Emuwa on such an important claim and issue; but we would have drawn the inference without relying on that additional feature of the litigation.

213. Even if we were wrong to draw a common law inference, given what was said, there was sufficient here to shift the burden under section 136; and in the absence of evidence from Mr Emuwa, that burden was not discharged in a way to satisfy us on the balance of probabilities, that a sexist attitude

towards the Claimant's situation, and how she might manage it, had not (consciously or not) been a material influence on his reaction and remarks.

214. Pausing there, the claim of direct discrimination in relation to this matter was therefore potentially made out, subject to consideration of whether it was out of time.

215. We also needed to address whether, in making this remark, Mr Emuwa was acting on behalf of UBN, UBUK or both. This was hard to disentangle because his remarks were partly directed to issues about whether she could cope in her role *in UBUK*, but partly to the issue of whether she should, as a consequence, be recalled to UBN. Whilst the latter would be a matter for him wearing his UBN hat, the former was a potential concern to him wearing *both* hats. Ultimately, we concluded that his thinking was materially engaged on behalf of both companies, and so this remark was made as an agent of both UBN and UBUK.

216. Subject to the time point, this therefore amounted to direct discrimination. The harassment claim added nothing further. We will, however, return to the question of whether this claim was out for time.

Compassionate Leave Request

217. The next complaint was of refusal or failure to deal with the Claimant's request for compassionate leave made on 13 May 2015. There is some contextual and factual overlap with the next complaint, of failure to progress bringing her children to the UK in May 2015, but we deal with them separately for the purposes of setting out our findings and conclusions.

218. The Claimant relied here on a hypothetical comparator only. The Tribunal was mindful that discrimination can occur by conduct that involves omitting to act as well as acting. Nevertheless, the underlying premise of the claim was that some sort of decision was taken not to progress or determine the compassionate leave application, or at least, perhaps, to deliberately allow it to drift, so that its refusal became a fait accompli; and that such a decision was taken at least in material part because the Claimant was a woman. Ms Prince also specifically confirmed that the Claimant's case was that the conduct complained of here was that of Mr Ali, not that of Ms Ntuk.

219. In light of our findings of fact, we did not find this claim to be made out. In particular, the Claimant's original request of 13 May was made with a view to her taking leave at the beginning of June. Ms Ntuk responded very promptly, noting the time sensitivity, but explaining that more documentation was required and returning to this in the 21 May email. It is clear that what she was referring to here was the surrogacy documentation.

220. The Claimant was therefore at this point on notice that the ball was in her court to produce this further material, even though she was looking to take leave at the beginning of June. However, as of the beginning of June, she had not produced this material. Then, on 8 June, she requested approval for the business trip, which was granted. She embarked on the business trip on 12th June, only providing the surrogacy documentation the same day.

221. The Claimant's case was that Dr Ali did not want to grant this request at all because he did not want to set any sort of precedent. She referred in particular to Ms Ntuk's email of 14 May in this regard. But, leaving aside whether, if that were true, it would, by itself, show direct discrimination because of sex, in any event, that is not what the email from Ms Ntuk said. That email reflected that there was a concern to handle the request with care, because *whatever* was decided about it would set a precedent in a novel area. But that does not point to an inference that they were minded to *refuse* the request for that reason. Nor did we think that the request for documentation was simply a tactic. That Dr Ali genuinely thought it important that the further documentation be produced, and the unusual issues to which this development gave rise be considered with care, was borne out by his internal exchanges with Ms Ntuk on 27 May, albeit those particular exchanges were in the context of the request for support on getting advice on transferring the Claimant's new family to the UK.

222. It was also submitted that the line taken in reaction to this request was disingenuous because UBUK already had a parental leave policy, which, at paragraph 3.7, stated: "If you have parental responsibility for a child under the age of 5 and have been continuously employed by the Bank for one year, you will be eligible for 13 weeks' unpaid parental leave…". However, we accepted Ms Ntuk's evidence that she did not regard that as designed to cover a case of surrogacy. We do not find any sufficient basis to infer that it was considered by Ms Ntuk or Dr Ali that the parental leave policy did fit the situation, but that they, despite this, deliberately denied the Claimant the benefit of that policy because she was a woman.

223. Further, reverting again to the chronology, in June the Claimant went on the business trip. When, whilst on that trip, she returned to the question of leave, the request that she then made was to use holiday leave. Further, that request was immediately granted and the Claimant then took holiday leave into the start of July. Ms Prince submitted that since this was only 9 days' holiday leave, and *not* compassionate leave, it should have been obvious that the compassionate leave request was still regarded by the Claimant as live and still requiring a response. But, given that he Claimant did not herself raise the compassionate leave issue again while away or on her return, and that the original request in May had been for compassionate leave to be taken in June, we found it not surprising that Ms Ntuk assumed in July that the original compassionate leave request had been overtaken by other events and was no longer being actively pursued.

224. Further, the emails suggested that Mr Ali, having had an initial discussion with Ms Ntuk, and made his points, was allowing her to manage the matter going forward and waiting to hear further from her. The only further approach that Dr Ali had from the Claimant herself after 13 May, was the later request for holiday leave, which he immediately granted.

225. There was no sufficient factual basis here to infer that Mr Ali took a decision at all to refuse, stall or otherwise avoid dealing with the original compassionate leave request, still less that any such decision was influenced by the fact that the Claimant was a woman, consciously or not. In these circumstances, the absence of witness evidence from Mr Ali on this

subject did not further advance the Claimant's case, and both the direct and harassment claims in respect of this matter failed.

Bringing Children to the UK

226. The next, and factually overlapping, complaint concerned failure to progress bringing the children to the UK in May 2015.

227. The Claimant's case was that Ms Ntuk's email of 27 May 2015 recognised that the UBUK was responsible for ensuring the smooth transfer of her family: she was going to find out the cost of getting the necessary advice and would revert as soon as possible. Yet, said Ms Prince, the Claimant never heard from Ms Ntuk again.

228. Once again, however, the discrimination of which the Claimant complained was on the part of Dr Ali and not Ms Ntuk. Once again, this would require a finding by us that the omission to come back to the Claimant was the result of some sort of decision *on the part of Dr Ali* not to progress the application, not to reply, or otherwise to stall it in some way; *and* we would have to find, through one route or another, that this was influenced, consciously or not, by the Claimant being a woman.

229. The Claimant relied on some actual comparators: Dr Ali himself, her predecessor Mr Baba, Dennis Ayerume, Walter Mbah and Mr Phido. All of them came over to the UK with their families.

230. In her written witness statement, Ms Ntuk said that, in such cases, UBUK was responsible for sorting out the employee's visa, and UBN for sorting out the position of any family members. Further, she said that consideration of the various comparators relied upon by the Claimant did not really cast any light on her case, because all of them already had families when they came to the UK, and had applied under the old 1971 Act system, save for Mr Phido, had had sorted out his family's visas himself.

231. Ms Ntuk's oral evidence was that following up with the lawyers on the question of their potential costs in relation to advising on the position of the Claimant's surrogate children, simply fell off her radar. She was the sole HR person in London and had a number of other priorities. She did not progress the matter because after the Claimant returned from her trip to Nigeria in July, she never reminded Ms Ntuk of the matter or chased her up.

232. We reviewed the emails with care for the light they might shed on this complaint. Ms Ntuk did suggest to Dr Ali that UBUK had a measure of responsibility for ensuring a smooth relocation of ex-pat staff, including their families; but it was also clear that she considered this not to be a straightforward case, because of the surrogacy element, and that she had established it would require bespoke legal advice at some potentially significant cost. She flagged this up with both Dr Ali and the Claimant, the clear tenor being that, though UBUK would give some support, that might only be up to a point. The support in the first instance was around sourcing legal advice and establishing the cost. The Claimant could not make any assumptions about who would actually bear that cost. Further, the further exchanges between Ms Ntuk and Dr Ali do not show him vetoing any

involvement by UBUK. They show him identifying his concerns and leaving the matter with Ms Ntuk.

233. We recognised that, following her conversation with Dr Ali on her return, about his conversation with Mr Emuwa, the Claimant may have decided that it was politic to adopt a low profile on issues to do with her children. But, whatever the reason, the fact is that she did not raise the subject of relocation again with Ms Ntuk or Dr Ali; and the only new piece of information they had in this general area, was that she had not yet successfully completed their passport applications. Ms Ntuk acknowledged in cross examination that she and the Claimant did have periodic chats about the children, and that she never asked the Claimant what her latest thoughts were about bringing them over; but even were we to infer that Ms Ntuk was not particularly disposed to raise the subject again unless or until the Claimant did, we found no sufficient basis to infer that Ms Ntuk's approach was prompted or influenced by a stance taken by Dr Ali, still less one in turn influenced by the Claimant being a woman.

234. There was, in conclusion, insufficient material here to support a finding of fact that Dr Ali took a decision not to progress this matter, still less, a decision which we might infer was influenced by the Claimant's sex, or in respect of which the statutory burden might pass, requiring it to be explained. In those circumstances the Claimant's case was not assisted by the lack of evidence from Dr Ali on this specific subject. Both the direct discrimination and the associated harassment claim, therefore failed.

Recall to Nigeria

235. We turn to the decision to recall the Claimant to Nigeria. We had to decide: who took the decision, in what capacity did they take it and why did they take it?

236. As to who took the decision, though we did not hear from him, the overwhelming picture that emerged from the evidence before us was that the actual decision was taken, and taken alone, by Mr Emuwa. We had no doubt that he would have drawn to some extent on information gleaned from colleagues in London; and we considered it fair to assume that he would have valued Mr Kasongo's input and had discussions with him. However, Mr Kasongo's evidence was that he did not participate in the decision itself. Mr Forster's evidence was to the same effect. Ms Ntuk said that she did not know about the decision until 3 December, when Dr Ali came to discuss with her the letter that he had received about it. We accepted the evidence of all three on these aspects.

237. The wider overall picture we had was one in which the decision whether or when to recall a seconded employee, rested with UBN as the seconding company and the employer. Mr Kasongo said that, constitutionally, within UBN, this fell to Mr Emuwa as the Chief Executive and Senior Executive Officer. Though Mr Kasongo's name was on the letter communicating the decision, along with that of the Head of HR, it seemed to us that this was because he was responsible for oversight on UBN's behalf of arrangements in relation to seconded employees. Further, that letter had the hallmarks of simply having been adapted from the letter that had been used for the

termination of the Claimant's predecessor's secondment: otherwise it is hard to explain the erroneous reference to handover to herself. Given all of this, we accepted Mr Kasongo's evidence that he did not participate in the decision as such and did not know precisely when it was taken, but that he nevertheless had some acquaintance with issues that he believed had contributed to the decision.

238. The Claimant's case was that Dr Ali had participated in the decision. His statement said that he was not involved or consulted at all; but he was not tested in cross examination. However, the overarching picture we had from all the evidence before us, was that, while Mr Emuwa may have been influenced by the views of various people, the decision was, indeed, ultimately one for him alone to take on behalf of UBN. The Claimant's main reason for suspecting the involvement of Dr Ali, she told us, was because of what had happened on 10 July. But on that occasion he was reporting to her what Mr Emuwa had said to him; and that episode did not support a picture of a process in which he and Mr Emuwa were co-decision-makers. Further, the tenor of the letter *to Dr Ali* informing him of the recall of the Claimant, the communications he was involved in it its aftermath, the fact that this decision was communicated at the same time as his own recall was confirmed, and the fact that Mr Kasongo got advance word of it from Mr Laws, and not from Dr Ali, all reinforced the conclusion that Dr Ali was *not* a participant in the actual decision.

239. Why did Mr Emuwa take this decision? Once again we had no witness evidence from Mr Emuwa at all, but had to do the best we could to come to a view about what his reason or reasons were, based on our findings of fact, and drawing on all the evidence available to us.

240. Mr Kasongo and Mr Forster suggested to us that it was clear that this decision was taken because of a build-up of issues concerning the Claimant's lacklustre performance, not helped by the matters that had caused her to receive a written warning. Mr Kasongo said that this had built up over a period of months, with concerns on the part of a number of directors as reflected in some of the minutes of meetings that we had seen. He said that it therefore came as no great surprise to him when Mr Emuwa took the decision that he did. Mr Forster's evidence was to similar effect.

241. There certainly were features of the facts that could be said to provide some support for this explanation. As we have recorded, there were reservations about whether the Claimant was sufficiently qualified for this role right at the start, both in Nigeria and in the UK; and there were various issues of concern and challenge raised with her at board and committee meetings, which it could be said did go beyond the normal testing and challenging of an employee in her position. Mr Forster said specifically, in his evidence, that Mr Biglia, the Chair of one of the key committees, had himself raised the question of whether her secondment should continue at one point. Her performance appraisals, while not disastrous, were not stellar either, and it might be inferred that the written warning could not have helped her cause, even though it was formally a stand-alone matter.

242. The Claimant's case, however, was that this explanation was not convincing, for a number of reasons. She had not received any

performance warnings, there was no mention of performance in the recall letter, her performance was not as bad as claimed, and she had a number of achievements to her credit. Criticism and challenge was a normal part of board and committee meetings. The purported explanation that this was about her performance was only given at a very late stage. The recall letter, referred to previous discussions, but there had been none. There was no obvious matter to do with her performance that would explain the timing of the recall. There was no mention in the recall letter of any particular job for her to return to; and the position eventually mentioned in March 2016, was already occupied by someone who had recently been recruited to it.

243. The Claimant's points here were not about the fairness of the process (though it was plainly part of her personal feeling that she was treated unfairly), but about the likelihood of the performance explanation being the true (or whole) explanation, given all these features of the matter.

244. The Claimant also submitted that it was very unusual for someone to be recalled so soon, by contrast with the male comparators who she relied upon – Mr Baba, Dr Ali and Walter Mbah – who all had several years under their belts, before their secondments terminated. It was, in fact, common ground that the original expectation was the Claimant could well be in the UK for up to five years, and that the secondment was terminated after an unusually short period. We had to form a view as to what was the unusual reason or reasons why it was terminated when it was, and whether these included her sex or any matter relating to it.

245. Mr Kasongo's broad response to the foregoing critique of the case that the reasons for the recall were all about performance can be summarised in this way: that, whether or not it be thought fair, this is how companies such as UBN do take and communicate such decisions. Decisions will be reached about whether a secondment has worked out, without the employee being taken through a performance process, and the decision is liable to be communicated without taking the trouble to explain to the employee why it has come about. The employer has the power of recall, and the employee is simply expected to accept the decision and to comply. Mr Kasongo indeed suggested that, once it has been decided that a secondment should be terminated, that will not necessarily be affected by whether there is a particular vacancy available for the employee to return to, on the basis that someone else can always, if necessary, be bumped out of their job.

246. The tenor of Mr Kasongo's evidence was therefore that he did not regard of the indicators relied upon by the Claimant as particularly undermining his impression that this decision was simply driven by Mr Emuwa's view of the Claimant's performance while on secondment. The Tribunal did attach *some* weight to Mr Kasongo's take on this matter. Though it may not be fair or in accordance with best practice, his account of how such decisions are taken and implemented, did chime with the Tribunal's industrial experience that such matters are indeed sometimes handled by employers in just the way that he described.

247. However, a major difficulty for UBN here was that it was Mr Emuwa who took this decision, and we had no evidence at all from Mr Emuwa himself as to why he actually did so. Mr Kasongo and Mr Forster clearly observed a

lot of what went on in UBUK in terms of the Claimant's performance, and how it was received; and Mr Kasongo, was, we accepted, in a position to cast some light on the governance of UBN and Mr Emuwa's style in that regard. We also accepted that neither of them was greatly surprised that Mr Emuwa had taken this decision. But when pressed in cross examination both of them accepted that they could not say for sure why Mr Emuwa had done so. Neither of them claimed, for example, that he had specifically given them an account of his reasons; and both accepted that such an early recall was indeed very unusual.

248. Standing back, and doing our best, and after considerable deliberation, these were our conclusions. Firstly, we accepted the Respondents' broad case that there *were* considerable and serious performance concerns and that these persisted over the whole period of the Claimant's secondment. As Mr Kasongo, in another of his pithy contributions, put it, there was a general sentiment that this secondment had not worked out, there had been concerns and reservations at the start and the Claimant was not felt to have dispelled those concerns or to have outperformed expectations.

249. As discrimination case-law recognises, unfairness is not to be simply treated a pointing to discrimination, although *unexplained* unfairness may support such an inference. Sometimes decisions of this sort are reached and communicated in a way that is less than transparent and may seem harsh, because that is simply the *modus operandi* of the business or the decision maker in matters of this sort.

250. In this case we concluded, in light of all our findings, that performance concerns was the *main* reason for this decision. But what we had to decide was whether a sexist view, or set of assumptions, about the implications of the Claimant having acquired her children, was also a contributing reason for this decision as well, though not the sole or the main factor.

251. We were once again concerned at this point by the strength of view expressed by Mr Emuwa, as reported to the Claimant by Mr Ali in July 2015. Suppose that the Claimant had been recalled within a matter of weeks following that conversation? Would that prior conversation, on that scenario, have supported an inference that these attitudes on the part of Mr Emuwa were a contributing reason for the decision to recall her? We would, we felt sure, have concluded that it did, or at least that it supported a shifting of the burden of proof. We asked then, whether, given the actual amount of time that passed between that conversation and the announcement of the recall, this made all the difference, breaking the potential link and enabling us to rule this out as a contributing factor, or something that at least caused the burden to shift.

252. That interval of some months did give us real pause for thought. It was not suggested that, during the second half of 2015, there were any significant ongoing problems for the Claimant at work connected with having acquired these children, although, as we have noted, nor did she draw any attention to the subject. The performance issues, by contrast, did continue to surface during this period, with the appraisal in September, and issues raised at the November board meeting; but nor did these seem to escalate dramatically.

253. The reason for the timing of the recall announcement was not obvious. Doing the best we could, however, the impression we had was that this was in some way linked to the changing of the guard in UBUK. It was striking that the notification of the Claimant's secondment came at the same time as confirmation that Dr Ali's recall was going ahead, and also that the person who tipped off Mr Forster was the incoming chairman, Mr Laws, who was himself due to take over in the new year. This impression also chimed with the fact that the Claimant was given very short notice to return by the end of the year, and that even when, after pleas from her, that was extended, there then appears to have been a half-hearted attempt by Mr Swomen again to row back on that in the phone call later in December.

254. So, we were left with the impression that the changing of the guard was regarded as the expedient moment to proceed with the implementation of the recall of the Claimant. That in turn gave rise to the possibility that the decision to recall her had, in fact, been taken some time earlier, and that meant that less significance might attach to the passage of time between July and December. Ultimately, once again, the further difficulty for the Respondents was the absence of any evidence from Mr Emuwa. Further, the recall letter itself cast no light on the matter.

255. Overall, we concluded that the factual matrix provided a basis from which we should infer that the sexist attitude to the implications of the Claimant having acquired her children, which influenced Mr Emuwa's remarks relayed to the Claimant by Mr Ali in July, did also form a materially contributory part of his reasons for deciding to recall the Claimant, communicated in December. Alternatively, there was sufficient here to shift the statutory burden of proof, which was not then discharged.

256. In principle, therefore, this claim of direct discrimination succeeded because our conclusion, whether by common law inference or by passing of the statutory burden of proof which was not discharged, was that this was a material contributing factor to the decision. In light of our findings of fact, we concluded that Mr Emuwa was wearing, solely, a UBN hat when he took this decision, so this claim succeeds against UBN solely. The direct discrimination claim having succeeded, the alternative harassment claim adds nothing.

257. However, as we have stated, performance issues were the principal reason for the decision. Accordingly, consideration will need to be given at the remedy stage to the *Polkey*-type issue[1] as to the chances that the Claimant would or might have been removed over the performance issue either around the point when she was in fact recalled, or at some point, even had this contributing feature of discrimination not also been present.

258. A further *Polkey*-type issue that will have to be considered in this case is the potential implications of the fact that this was not a dismissal, but a decision to terminate the secondment and return the Claimant to working based in

[1] That is to say, an issue that is the conceptual equivalent of one of those which lawyers compendiously refer to by the shorthand of *Polkey* in unfair dismissal cases, and which the decision in **Chagger** [2010] ICR 397 (CA) confirms may equally fall for consideration in discrimination cases.

Lagos, Nigeria; and of the fact that she ultimately did not return to work in Lagos, and then resigned at the end of March 2016. Although the Tribunal did not have the jurisdiction (this was the international jurisdiction point) to consider the claims originally raised in relation to this third period, how matters unfolded during this period (or might have done) may require further consideration as part of a further *Polkey*-type issue.

Time Points

259. We have found that there is a well-founded claim that the Claimant's recall was an act of discrimination, on the part (solely) of UBN. That claim is in time.

260. Subject to the issue of time, there was also a potentially well-founded claim in relation to the remark by Mr Emuwa conveyed to the Claimant on 10 July 2015, which we found was made on behalf of both UBN and UK. As against UBN, that fell to be regarded either as part of a continuing act together with Mr Emuwa's decision to recall the Claimant, or, alternatively, given the synergy of the decision-maker and the underlying subject matter, we concluded that it would be just and equitable to extend time in relation to the claim for that, as against UBN. However, as against UBUK, this was the only, first and last, act of discrimination and it was significantly out of time. Although Mr Ohringer admitted that UBUK was not, owing to the passage of time, as such, in any forensic difficulty defending it, that was not sufficient to amount to a *positive* case as to why it would be just and equitable to extend time as against UBUK; and we were not persuaded that it was. Accordingly, as against UBUK, that claim ultimately failed.

Claimant's Conduct

261. We turn to the matters regarding the Claimant's alleged conduct raised as giving rise to what lawyers for shorthand call either *Polkey* or *Devis v Atkins* issues.

262. We need to refer here to the contract and policy provisions said to be of relevance. We have already noted the terms of the prohibition on engaging in any other business, in clause 4 of the Claimant's original contract (paragraph 15 above).

263. In addition, the UBUK compliance manual includes the following:

> 8.1 Declaration of Interest
>
> At meetings of the Bank's Boards and Committees Directors and senior management are required to declare any personal interests prior to the matters to be discussed and should take no part in any subsequent decision.
>
> 8.2 Personal Dealings with Customers
>
> Members of staff are not permitted to carry out personal transactions with the Bank's customers (whether at arm's length or not) since such transactions may compromise their independence and objectivity. This includes introducing a friend or associate to a customer.

264. The Rules and Information of UBUK includes, at clause 2.4, a requirement to devote the whole of time, attention and abilities to the bank during normal business hours and additional hours, as required, and continues:

> You must obtain the permission of the Bank before engaging in any other business, trade or profession, either directly or indirectly, in any capacity whatsoever, whether or not you are receiving remuneration of any sort. This does not apply to voluntary or charity work.

265. The Code of Conduct of UBUK provides, at 1.3, and under the heading: "Avoid Conflicts of Interest":

> Employees must take appropriate measures to recognise and manage situations where a conflict of interest might arise between their personal interests and those of the Bank or its customers or prospective customers.

266. The matters that Mr Ohringer submitted involved conduct on the part of the Claimant infringing one or more of these provisions, and our conclusions in relation to them, were as follows.

267. Firstly, in September 2015 the Claimant managed and supported a loan application for a client called Stallionaire and advocated that it be cleared through risk. A friend of the Claimant was associated with the client and there was evidence that he communicated about the matter using her personal email, rather than, or in addition to business email. However, the evidence before us did not establish that the Claimant herself had any interest or role in any Stallionaire company at that time. Further, Mr Kasongo fairly accepted in evidence that batting hard with Risk in support of a transaction that she had negotiated did not cross any line as such.

268. We considered that the Claimant was open to some criticism that she should have taken a firmer line with her friend than she apparently did regarding his repeated use of her personal email, and this gave some fair cause for concern. However, there was no hard evidence before us that at this time the Claimant crossed a line in terms of her duties to the bank.

269. However, a second matter relied upon by the Respondents was the evidence that showed that a UK subsidiary of Stallionaire was set up in early 2016 and that in February the Claimant became a director of that company. We concluded that this was conduct that did contravene UBUK's procedures: she should not have become a director of a company that was a client, or associated with one, arguably at all, but certainly not without declaring her interest or intended interest and seeking permission to assume this office.

270. The Respondents also relied on evidence that the Claimant, whilst still employed by UBUK, had been involved in steps preparatory to the incorporation of a company called Linktree Limited, of which she was to be a shareholder and director. However, this company was not in the event incorporated, and although some preparatory steps were taken, we considered that, as the plan was not implemented by actual incorporation, this activity stopped just the right side of the line, as she did not actually become engaged, through this vehicle, in another business.

271. The final matter concerned the Claimant having taking certain steps in January 2016 towards seeking an entrepreneur's visa to remain in the UK. This entailed a need to demonstrate and document that sufficient financial substance lay behind her proposed business project. To that end, she asked a friend to procure a letter from another bank stating that, in one way or another, an investment of £50,000 was available to made into that project. We considered that this was indicative of more than mere preparatory steps on the Claimant's part. It required that some concrete facility be in fact put in place with another bank, and in fact available to her project; and that entailed her having, at least indirectly, an interest in those arrangements, with the associated potential for conflict.

272. The Claimant's evidence was that she became engaged in these various activities in the aftermath of her sudden recall to Nigeria, because she was concerned that her future with UBN was uncertain and insecure; and she believed she needed to explore her options, and begin taking steps towards finding another possible job and/or basis on which she might be able to remain in the UK. We accepted that, as a matter of fact, that was why she became engaged in these activities, and that she would not have done so, had she not been recalled at all at this time.

273. The Respondents' position was that this explanation did not, as such, excuse her engaging in activities that contravened their policies, which she simply should not have done, at a time when she was, in fact, still working for UBUK and/or employed by UBN. However, as a distinct point, Mr Ohringer conceded that, if we found, as we indeed have, that (a) the decision to recall the Claimant involved discrimination; and (b) this behaviour on her part would not have happened, had she not been recalled at this time, that made consideration of a *Polkey*-type argument based on this conduct more complicated. This requires a little unpacking.

274. The Respondents' particular argument, here, at its highest, is that, when we come to assess remedy for the discriminatory decision to relocate the Claimant, we should take into account the chance that she would, or might, have in any event at some point lost her job on account of this conduct. However, since, even if it did not provide an excuse, the conduct was in fact a reaction to the recall, it was open to the Claimant to argue that, had she not been recalled, the conduct would not have occurred, and so no such discipline could or would have followed.

275. However, neither would this line of reasoning automatically provide a complete answer to this *Polkey*-type argument. That is because, given our finding as to the mixture of reasons why the recall occurred, we will need to give further consideration to the question of whether, or when, even absent discrimination, she would, or might, have been recalled over issues concerning her performance in the seconded role; and, if so, whether she would, or might, then, have taken the same steps in reaction to the recall, and would, or might, in due course, have been sanctioned for such conduct.

276. Mr Ohringer also argued that an alternative way in which the Respondents could rely on this conduct as impacting on remedy, was to advance the proposition that, in view of her conduct, it would not be just and equitable to

compensate her for whatever loss she had otherwise suffered as a result of discrimination. The legal analogy here, he suggested, drawn from the context of unfair dismissal remedies, is not with the *Polkey* line of argument, but with the line of argument based on the case of **Devis v Atkins** [1977] ICR 662 (HL). This, however, requires some further examination.

277. The *Polkey*-type argument may be run in relation to discrimination, just as in relation to unfair dismissal remedy, because in both situations the purpose of the financial award is not to punish but to reflect the loss sustained because of the unlawful treatment. The anchor of the *Devis* doctrine in unfair dismissal, is however, the wording of section 123(1) to the effect that the *overriding* measure of a compensatory award is such amount as the Tribunal considers "just and equitable in all the circumstances", which is to be determined not solely by reference to, but "having regard to", the loss sustained. So, in an appropriate case, the Tribunal may conclude that the conduct of the claimant is so serious that it would not be just and equitable for them to be compensated for the loss caused by the employer's treatment of them.

278. Ms Prince conceded that, as a matter of law, in principle, an analogous line of argument could be mounted in relation to compensation for an act of sex discrimination, applying a "just and equitable" test. However, the mechanism needs to be considered. Under section 65(1) **Sex Discrimination Act 1975**, where a discrimination claim was well founded, the Tribunal could make a declaration, an award of compensation or a recommendation, the preamble stating that it "shall make such of the following as it considers just and equitable". The authorities established that, accordingly, the just and equitable test governed the initial decision *whether* to award compensation at all. The Tribunal might, in a given case, decide that it was not just and equitable to do so. But, if it did decide to award compensation, then that compensation should fully reflect the loss suffered (including taking account of *Polkey*-type arguments).

279. The wording of section 124 **Equality Act** is not identical, and the phrase "just and equitable" no longer appears. However, reading the section as a whole, we concluded that this an instance of the drafter of the 2010 Act having adopted what may be thought to be a simpler and more elegant style, but without intending to change the underlying approach. Thus, section 124(2) provides that the Tribunal "may" implement any of the three types of remedy. It follows that it is not bound to award compensation in every case. But it goes on to provide in section 124(6) that the amount of compensation should correspond to what could be awarded by the county court – which section 119 provides should follow tortious principles.

280. So, the net effect is the same. The Tribunal has a discretion whether or not to award compensation; but if it does so, it must award such amount as reflects the loss flowing from the discrimination itself. In exercising the discretion, the Tribunal must, of course, act judicially, considering relevant, and ignoring irrelevant, factors – which is surely a similar, if not identical, exercise, to weighing up considerations of justice and equity to both parties.

281. In the present case, therefore, we had to decide whether the conduct of the Claimant to which we have referred was so very serious that it would not be

just and equitable for her receive any compensation at all. In light of our foregoing findings about it, we did not consider it to be so very serious, in its nature or impact, as to make that the just and equitable outcome.

282. The Claimant is therefore, in principle, entitled to compensation for the acts of discrimination found, in relation to Mr Emuwa's remark, and in relation to the recall, against UBN. However, careful consideration will have to be given to how that is to be calculated, bearing in mind the various *Polkey*-type issues that remain to be resolved, as well as other issues that may arise, and have yet to be considered, including, in particular, issues of mitigation raised by the Respondents.

283. All outstanding issues, will be considered at a further remedy hearing.

Employment Judge Auerbach
1 August 2017