



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON CENTRAL
BEFORE: EMPLOYMENT JUDGE ELLIOTT
MEMBERS: MR T ROBINSON
MS J WEBBER

BETWEEN:

Ms D Ball
Claimant

AND

Coutts and Co
Respondent

ON: 23, 24, 25, 28, 29 January 2019
IN CHAMBERS: 30, 31 January and 1 February 2019
Appearances:
For the Claimant: Mr L Davies, solicitor
For the Respondent: Ms G Hirsch, counsel

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The claim for age discrimination is dismissed on withdrawal.
2. The remaining claims fail and are dismissed.

REASONS

1. By a claim form presented on 21 May 2018, the claimant Ms Donna Ball brought claims for age and sex discrimination and equal pay for like work. Her employment with the respondent is continuing.
2. The claimant had presented a further claim to the tribunal (case no, 2206885/2018) in respect of which, by the date of this hearing, time had not expired for the presentation of the ET3. This second claim was therefore not under consideration by this tribunal.
3. The claimant remains employed by the respondent Bank as an Associate

Director in the Commercial Banking Division.

The issues

4. A preliminary hearing took place before Employment Judge Snelson on 6 September 2018 at which the claimant was ordered to set out a schedule of her claims. The parties were ordered to produce an agreed list of issues by 26 October 2018.
5. It was clarified at that hearing that although the claim form referred to indirect discrimination no such claim was intended. It was clarified that the claims are for direct discrimination and/or harassment and/or victimisation and equal pay. Following the preliminary hearing and in a letter dated 4 October 2018, the claimant withdrew the claim for age discrimination.
6. The claimant informed the tribunal at the preliminary hearing that the claim related to a decision not to put her forward for promotion in the 2017 promotion round; the bonus and pay rise awarded to her in 2018; the line manager's end of year comments; the treatment over her data breach incidents; allegedly unwarranted criticism and similar treatment; her line manager's evidence at the grievance appeal stage and the requirement to complete extra-curricular tasks.
7. Judge Snelson ordered that the evidence and closing submissions on liability must be completed at the very latest by midday on day five of this hearing namely Tuesday, 29 January 2019. This was to allow for tribunal deliberation. A further two days were added to the hearing allocation for tribunal deliberation.
8. The claimant had some representation from counsel from about October 2018 and from 2 December 2018 has had solicitors on record. The claimant was acting in person when she presented her claim.
9. A further telephone case management hearing took place before Employment Judge Snelson on 4 January 2019. At that hearing it was noted that the claimant had presented case number 2206885/2018 but that it had not yet been served. It was served by the tribunal on 7 January 2019 and the respondent had until 4 February 2019 to enter a response. We did not hear this claim. The parties agreed at the telephone hearing on 4 January 2019 that the hearing of this claim, 2204615/2018, should proceed and the Judge shared that view.

Anonymity

10. By consent we ordered that the claimant's comparators be anonymised to their initials and the respondent's clients be anonymised to the lettering in the table with which we were provided. This was the subject of a separate order and a Restricted Reporting Order.

Witnesses and documents

11. There was a bundle of documents which ran to three lever arch files and about 1,300 pages. We had a bundle of witness statements. There was a chronology which was mostly agreed, a cast list with acronyms and a proposed timetable. We also had a table which showed the anonymisation of comparators and the respondent's clients.
12. The tribunal heard from the claimant.
13. For the respondent the tribunal heard from 4 witnesses: (i) Mr David Waters, an Executive Director, who was the claimant's line manager, (ii) Mr Christopher dos Santos, a Managing Director and Head of Commercial Banking and Mr Waters' line manager, (iii) Mr Brian Owen, a Director, who heard the claimant's grievance and (iv) Mr Mark Neville, an Executive Director, who heard the claimant's grievance appeal.
14. We had a supplemental statement from Mr dos Santos which was introduced because of the issue concerning comparator AW's portfolio figures and further explanation on the figures. We gave leave for this statement to be introduced. The claimant also had a supplementary statement which was served prior to the commencement of the hearing.
15. We had detailed written submissions from both parties to which they spoke. They are not replicated here. The submissions, together with any authorities referred to, were fully considered, even if not expressly referred to below.

The issues

16. We confirmed the issues with the parties at the outset of the hearing on day 1. The issues are as follows.
17. For the sex discrimination claims, the claimant relies upon 14 substantive allegations (one was withdrawn as set out below). They were set out in a schedule at page 45 of the bundle. In narrative form they are:
 - i. Not being considered for or put forward for a second interview in relation to the 2016 promotion process – direct sex discrimination – hypothetical comparator. This allegation was withdrawn on day 1.
 - ii. Wrongly awarding the claimant a level 3 rating for year performance for 2016 – direct sex discrimination – comparators AW and PQ
 - iii. Not putting the claimant forward for promotion in the 2017 promotion round and doing so on the basis that a performance rating of three precluded her from being nominated – direct sex discrimination or harassment – comparator DM.
 - iv. The grievance decision made by Mr Brian Owen – direct sex discrimination and/or victimisation – hypothetical comparator
 - v. Alleged oppressive disparaging and unreasonable and unwarranted end of year comments for 2017 by Mr David Waters including the performance being marked down as a three grade – direct sex

- discrimination and/or harassment and/or victimisation – comparator for direct discrimination is AW.
- vi. Issuing an informal warning in relation to a data breach and failure to follow due process in that regard – direct sex discrimination and/or harassment and/or victimisation – comparator for direct discrimination is AW.
 - vii. Her line manager (Mr Waters’) evidence during the grievance appeal process which the claimant contends was inaccurate, derogatory and incorrect– direct sex discrimination and/or harassment and/or victimisation – hypothetical comparator for direct discrimination.
 - viii. The appeal decision including the reversal of the grievance outcome recommendation regarding the automatic trigger for nomination for promotion - direct sex discrimination and/or harassment and/or victimisation – hypothetical comparator for direct discrimination.
 - ix. Not receiving recognition for loan volume drawdown in 2017 or 2018- direct sex discrimination and/or harassment and/or victimisation – hypothetical comparator for direct discrimination.
 - x. The decision not to put her forward for promotion in the 2018 promotion round thus denying her promotion- direct sex discrimination and/or harassment and/or victimisation – hypothetical comparator for direct discrimination.
 - xi. Requests by her line manager to provide services/undertake extra-curricular activities - direct sex discrimination and/or harassment and/or victimisation – hypothetical comparator for direct discrimination.
 - xii. Not being permitted the “adjustments” (in relation to client TT) with the result that the reduction would have to be absorbed in 2018 - direct sex discrimination and/or harassment and/or victimisation – SW comparator for direct discrimination.
 - xiii. Failure to pay proper discretionary bonus - direct sex discrimination and/or harassment and/or victimisation – AW is the comparator for direct discrimination. This is also put as allegation (xiii(a)) Failure to pay equal pay – put us direct sex discrimination although this is an overlap with the equal pay claim and AW is named as the comparator.
 - xiv. Failure to pay proper pay rises - direct sex discrimination and/or harassment and/or victimisation – comparator AW for direct discrimination. This is also put as allegation (xiv(a)). Failure to pay equal pay - this again appeared to be an overlap.
18. The claim for direct sex discrimination is whether in relation to the allegations relied upon as direct sex discrimination the claimant has been treated less favourably than her comparator and if so was the reason because of her sex.
19. For the harassment claim in relation to the allegations relied upon as harassment, did the respondent engage in unwanted conduct falling within the definition of section 26 of the Equality Act 2010 (EqA) and was that conduct related to the claimant’s gender?

20. For the victimisation claim the protected act relied upon is the claimant's grievance dated 21 July 2017. The respondent admits that this was a protected act and confirmed this during submissions.
21. Did the respondent subject the claimant to a detriment because she did a protected act or because the respondent believed that she did or may do a protected act? There is nothing relied upon that precedes the protected act.
22. For the equal pay claim it is a like work claim under section 65(2) EqA. Like work is conceded and the respondent does so on the basis that everyone in the Associate Director role in the claimant's team did the same job, and the respondent relies upon the material factor defence. Has there been a breach of the sex equality clause in the claimant's contract of employment in relation both to her pay and bonus? Has the respondent established a material factor defence under section 69?
23. Are the claims within time under section 123 EqA?
24. Has there been any unreasonable failure on the part of the respondent to comply with the ACAS Code on Disciplinary and Grievance Procedures? If so, should there be any uplift in any compensation awarded to the claimant?
25. The parties were asked on day 1 to inform us on day 2 as to what was relied upon as the unreasonable failure. We were given a schedule from the respondent in which they contend that the claimant only raised allegations (ii) to (iv) and allegation (v) only to the extent that it was not already covered by allegation (ii). In respect of all the other issues, including equal pay, the respondent seeks a reduction in any compensation that may be due to the claimant, by 25%.

Findings of fact

26. The claimant is employed by the respondent Bank as an Associate Director in the Commercial Banking Division. Her employment commenced on 1 October 2010. She complained that she had not been promoted since joining.
27. The respondent is a well-known and prestigious bank. It is not open to anyone as a client. Its clients must have at least £1 million in liquid assets. It is part of the RBS banking group.
28. The claimant has a long career in banking. She joined NatWest in 1983 and was headhunted by Barclays Corporate in 2006. She did well in both those organisations and joined the respondent in December 2010. She has about 31 years of experience working in the banking sector.

The gender statistics background

29. The claimant's case is that the respondent is an "old school bank" with the Commercial Banking department being "very traditional". The respondent does not dispute that it comes from a position, like most banks, where they were male dominated in the past and where senior staff have often been in post for a long time, so there are fewer opportunities for promotion. Of the respondent's four witnesses, they all had around 30 years' service with the respondent or the wider Group. They say that they are slowly moving in the right direction towards gender equality.
30. We did not always have the gender statistics that we would have wished for in this case, although we do not say this with any criticism. We were presented, in submissions, with a table from the respondent showing their Coutts Commercial male-female split at senior level as at 31 December 2018, but this was not put in evidence. The predominant period under consideration in this case was 2016/2017.
31. The claimant told the tribunal that the respondent's Board is made up of four Directors, of whom three are male and one is female (statement paragraph 12).
32. The claimant was the only female Commercial Banker with a portfolio at the relevant time. She was not the only female Associate Director. She accepts that in 2017 there were two female Executive Directors, two grades above herself. There were about 7 male Executive Directors (Mr dos Santos' oral evidence). At Director level there were about 20 men and one woman. At Associate Director level there were about 3 women and around 20 men (Mr dos Santos' evidence). The statistics improved slightly, in favour of women, in 2018.
33. Until 1 February 2018 Mr David Waters was the team leader for the claimant's team. The claimant's team is known as "PFP" - Professional Services, Financial Services and Private Commercial Banking. There are 4 teams that make up the respondent's commercial banking sector. The other three teams or sectors are Commercial Real Estate known as CRE; Hotels, Healthcare and Insurance known as HHI and Media.
34. The claimant was the only female Associate Director (AD) portfolio manager out of about 47 in total. She believes there is a 'glass ceiling' within the Commercial Department, preventing her from being promoted. There are 7 AD's in her team (PFP). She accepts that she is paid more than all of them save for her comparator AW.
35. Within the wider RBS Group, the claimant was invited to roundtable discussions with Ms Alison Rose, the Chief Executive of RBS Commercial and Private Banking, regarding improving the culture of the business (claimant's statement paragraph 33).
36. The claimant's starting salary with the respondent as an Associate Director in December 2010 was £53,000, with an overall package worth £68,900. By 2017 her basic salary had increased to £60,709.

The pay system

37. The claimant works as an Associate Director (AD) Relationship Manager (RM) in a client facing role. Salary increases up to Director level are controlled centrally and apply to everyone. Increases are determined against an agreed matrix. In each job category there is a reference point deemed to be the market level for that role. By way of example in the 2018 pay round, the matrix level for an AD was:

Minimum salary – £48,792
Reference salary – £60,990
Maximum salary – £73,188

38. ADs are paid at least the minimum salary and are capped at the maximum salary.

39. Annual pay rises depend on two key matters: firstly, how the individual has contributed to the business in the performance year as evidenced by their performance grade and secondly, where that individual sits in the range compared to the reference point (mentioned above). The pay system is managed by the respondent's HR team which also conducts a process known as calibration – described in more detail below.

40. To achieve a pay rise, employees must be graded 3 or above in their annual performance rating known as a PEF. Anyone who rates as unsatisfactory, shown by performance grades 1 or 2, does not receive a pay rise.

41. The performance ranking system is on a scale of 1 to 5. Grade 5 is for truly exceptional performance. Grade 4 means that the employee has outperformed their objectives. The majority of staff are expected to be graded at 3, which means they have achieved a fully satisfactory result, meeting all of their objectives at the required level. Around 55% to 65% of the overall staff population receive a grade 3 (Mr dos Santos' statement paragraph 74). Grade 3 means that the employee has done well, it does not indicate average or below standard work. Grades 1 and 2 are for low performance and are not relevant to the facts in this case. The respondent is and was always happy with the claimant's performance.

42. The ratings were set out on page 786d and we set out the three relevant grades as follows:

2 Rating – one or more key objectives not achieved and/or behaviours not demonstrated.

3 Rating – fully achieved objectives throughout the year and behaviours have been demonstrated at required level

4 Rating – all objectives fully achieved and some have been consistently exceeded throughout the year and all required behaviours demonstrated and some have been consistently exceeded.

43. The amount of the pay rise is decided against a matrix based on salary range and performance rating. For 2016, 2017 and 2018 it is set out below.

2016

Pay Matrix

		Position in Salary Range			
		Less Than 90.00%	90.00%-94.99%	95.00%-104.99%	105.00%+
Your Performance Rating	5	Up to 11%	Up to 9%	Up to 6%	Up to 3%
	4	Up to 9%	Up to 6%	Up to 3%	Up to 2%
	3	Up to 6%	Up to 3%	Up to 2%	Up to 1%

2017

Pay Matrix

		Position in Salary Range				
		Less Than 90.00%	90.00%-94.99%	95.00%-104.99%	105.00%-114.99%	115.00%+
Your Performance Rating	5	Up to 11%	Up to 9%	Up to 6%	Up to 4%	Up to 3%
	4	Up to 9%	Up to 6%	Up to 4%	Up to 3%	Up to 2%
	3	Up to 6%	Up to 4%	Up to 3%	Up to 2%	Up to 1%

2018

		Position in Salary Range				
		Less Than 90.00%	90.00%-94.99%	95.00%-104.99%	105.00%-114.99%	115.00%+
Your Performance Rating	5	Up to 11%	Up to 9%	Up to 6%	Up to 4%	Up to 3%
	4	Up to 9%	Up to 6%	Up to 4%	Up to 3%	Up to 2%
	3	Up to 6%	Up to 4%	Up to 3%	Up to 2%	Up to 1%

44. As it is a centralised system it defaults to putting people in the middle of the range and senior management then have to consider any movement up or down the range within the context of the budget allocated. Within the Commercial Banking department headed by Mr Christopher dos Santos, he aims to avoid any member of staff receiving a pay increase below the cost of living and that can mean that those at the top end receive a slightly lower award.
45. It was admitted by the respondent (Mr Waters' oral evidence) that in terms of the respondent as a whole, women's mean average hourly rate of pay is about 24% below that of men in the organisation. Statistically men also achieve more in bonus than women. There are more men than women in the respondent's employment and more women in admin and clerical roles which do not attract a bonus, which affects the figures. Mr Waters agreed that one of the challenges for the respondent bank was to have more women in senior roles and they are taking steps to address this.
46. The claimant's pay awards for the last three years were as follows. The PEF rating is the previous year's performance rating.

Pay year	PEF rating	Matrix range	Actual
2016	4	Up to 6%	3.75%
2017	3	Up to 3%	2.50%
2018	3	Up to 3%	2.12%

47. In comparison, AW’s PEF ratings for the same three years were 2016 – 3; 2017 – 4 and 2018 – 4. He transferred to PFP in the second quarter of 2016 on a salary of £60,442 compared with the claimant’s salary at £59,228. AW’s salary increases by percentage for 2016, 2017 and 2018 were: 2016 – 2%; 2017 – 2.5% and 2018 – 3.3%. Therefore AW received a lower increase in 2016, the same increase in 2017 and a higher increase in 2018 (table page 1168-9).
48. The claimant accepted in evidence that amongst the AD’s in her team, of which there were seven, (page 1168-9), she was paid more than all the others (who are male) with the exception of her comparator AW.
49. If an AD came into the team, as was the case for the claimant’s comparator AW who transferred from HHI in 2016, she accepted that in considering his performance, what he did before he joined PFP was relevant for consideration in his annual performance review. Mr dos Santos was keen for AW to transfer to PFP from HHI and honoured his existing salary of £60,442.
50. The claimant’s evidence was that she thought that she should be paid more even than her managers, Mr Waters and his manager Mr dos Santos because she has a law degree and neither of them has a degree. Her law degree was not the only reason why she thought she should be paid more than them, but she did not say what those reasons were.

Pay and comparison with AW

51. The claimant accepted in evidence that in 2013 and 2014 she and AW both received the same percentage pay rise, of 2%. The following year she received 2% and he received 1.5%. In 2016 the claimant received 3.75% and AW received 2%. In 2017 they both received 2.5%. In 2018 the claimant received 2.13% and AW received 3.3%.
52. AW joined the claimant’s department PFP, in 2016 from HHI and we have set out his salary above. In 2017 AW’s salary was £61,953 and the claimant’s was £60,709 taking account of the pay rises.
53. Part of the claimant’s case was that the raising of her grievance on 21 July 2017 negatively affected her pay rise. We make findings on this below.

The calibration process and the bell curve

54. Each business area assesses its team members’ performance against objectives, as well as doing a peer-to-peer comparison and a comparison

across grades to ensure one area or grade is not being favoured or disadvantaged compared to another. This is known as a calibration exercise. This uses common data across peers, and involves senior management using their knowledge of individuals and markets to give appropriate context. The 'bell curve' is also used as a tool to ensure that relative performance results are in line with expected outcomes. The bell curves for 2016 and 2017 are shown below.

2016		Total Commercial		Male			Female		
Rating	Bell Curve	No.	%	No.	% of total	% of men	No.	% of total	% of women
5	0 – 5%	4	4%	4	4%	5%	0	0%	0%
4	15 – 25%	31	28%	20	18%	26%	11	10%	34%
3	55 – 65%	71	65%	50	45%	64%	21	19%	66%
2	5 – 20%	4	4%	4	4%	5%	0	0%	0%
Total		110	100%	78	71%	100%	32	29%	100%

2017		Total Commercial		Male			Female		
Rating	Bell Curve	No.	%	No.	% of total	% of men	No.	% of total	% of women
5	0 – 5%	8	7%	6	5%	8%	2	2%	6%
4	15 – 25%	30	27%	20	18%	26%	10	9%	29%
3	55 – 65%	64	58%	42	38%	55%	22	20%	65%
2	5 – 20%	8	7%	8	7%	11%	0	0%	0%
Total		110	100%	76	69%	100%	34	31%	100%

55. The calibration process aims to achieve consistency. Team leaders set the performance ratings within their individual teams and then it goes forward for consideration by senior management.
56. The results from the teams are pulled into one table so that comparisons can be made across them, using the guidance of the bell curve. The table is then discussed by the senior management team consisting of Mr Dos Santos, the other team leaders which included Mr Waters and the Business Manager. This is known as the calibration meeting where they make the appropriate comparisons to ensure that any under or over performance is assessed consistently across the teams.
57. There are a number of factors considered at the calibration meeting. This includes individual performance, team performance, comparisons across the whole unit and comments from senior managers on the individuals from observations during the year. At the end of the calibration meeting

individual grades can be changed either upwards or downwards.

58. After that meeting the grades are then submitted into the system but are still capable of being challenged at a more senior level within the organisation. Mr dos Santos provides comments to his own manager, Mr Dylan Williams, on under and over performers, as this is the area which requires most attention.
59. Once the year-end performance grades have been signed off at senior level, the individual staff members are informed in a 1:1 meeting. Employees have the opportunity to challenge their grade. There is a timeline for this which is available on the respondent's intranet.

Bonus

60. Bonus payments at the respondent are discretionary although they are heavily influenced by the individual's performance grade. At AD level, the claimant has been eligible for consideration for a bonus since she joined the respondent.
61. Eligible employees with a performance rating of grade 4 or 5 normally receive a bonus. Not all eligible employees rated at 3 will receive a bonus. The percentage of employees rating at 3 is around 55-65% of the entire staff. Over recent years the percentage of employees rating at 3 who receive a bonus has trended downwards. The respondent said that it is now not uncommon for 30% - 50% of grade 3 staff not to receive a bonus.
62. The factors affecting the amount of a bonus include performance grade and seniority. Higher bonuses are paid to those rated at 4 and 5. The "bonus pot" allocated each year is affected by a number of factors including the overall performance of the Group, the Bank, the England & Wales coverage area and within that, the performance of the Commercial unit (being the unit in which the claimant works). If the unit has had a strong year the pot will generally be higher.
63. The claimant has always received a bonus, even when rated at 3. We saw that for the performance year 2016 (paid in 2017) comparator PQ received no bonus and had a 3 rating (table page 1168-9). It was her comparison with AW which was in issue. The claimant accepted in her oral evidence that there are factors other than gender that can affect bonus. One of the examples she gave was the annual staff survey which is known as "Our View". The claimant accepted that the survey results affected the bonus pot that was made available to everyone.
64. The staff survey results are intended to be confidential. The claimant took the view that because she identified in the survey as female and because of the team she was in, it was obvious who she was. Her manager Mr Waters said that this information was not visible to him. The claimant said that she sometimes answered the survey as a man, so the results could not be traced back to her. In our combined industrial experience and

based on Mr Waters' evidence we find on a balance of probabilities that he could not identify the claimant from the survey.

Nomination for promotion

65. One of the respondent's aims is to promote good and long lasting relationships with its clients. One of the ways they do this is to allow their client relationship managers (RM's) to apply for promotion whilst retaining their existing portfolio of clients. This means that they do not necessarily have to wait for a vacancy for a senior post to achieve promotion. They refer to this as "in-role" promotion.
66. To achieve in-role promotion, employees have to show that they meet the criteria for the role and demonstrate that they are performing above their existing level. This helps to demonstrate to senior managers that the employee is ready to perform at the next level.
67. Just because an employee gains an annual performance rating of grade 4 or 5 does not automatically mean that they are eligible for promotion. Equally an employee at grade 3, with support from their line manager, can make a business case for promotion. Senior managers look at performance scores over the last three years, to assess whether the employee has a strong enough track record of high performance.
68. Annual performance rating is not the only criterion used to consider whether an employee should be nominated for promotion. In 2017 one of the criteria was "book size" (pages 967 – 968). AD's were expected to have portfolios generating at least £2.5m of income and Directors were expected to have portfolios generating £3.5m. Mr dos Santos' evidence was that in 2017 the claimant was generating around £2m which was below that expected of her current grade and well below that expected at Director level.

Promotion criteria

69. We saw the promotions criteria issued to managers at pages 967 – 968. It said that when applying the promotion criteria, it was important to note:
 - *There will be a **limited number** of promotions each year and therefore **rigor should be applied in selecting potential candidates***
 - *taking on a **broader role is not an automatic criteria** for promotion. An employee can take on **additional responsibilities** within their role that wouldn't necessarily take that role to the next level in the corporate title structure*
 - *it is important that promotion candidates meet the required standards across the wide range of criteria*
 - ***no guarantees** should be made to employees in relation to their likelihood of success nor for a salary increase as a result of a promotion.*
 - ***Talent and performance ratings should not be forced to support a promotion request.***
 - ***That you are reflecting our philosophy for 'Right Client Right Advisor' and that your nominee reflects appropriate sizes for, client loading, book size and income at each roles grade for advisers across private banking. This approach***

is used only by Coverage and excludes [x] advisors.

70. The document went on to give further guidance under four headings, Number of Candidates; Performance Rating; Assessment and Time in Role. Under the heading Performance Ratings it said: "***Candidates would typically have achieved a performance rating of 4 and no less than 3.***"
71. Under the heading Number of Candidates it included the statement: "***Promotions should positively reflect diversity and inclusion metrics in line with the cultural agenda; a robust review of the split of male/female nominations required***".
72. The document setting out the promotion criteria includes guidance for managers in respect of promotions for private bankers. We were told in evidence by the respondent that this also applied to commercial bankers such as the claimant and AW. We find in the absence of any other evidence, that these were the criteria that applied to commercial bankers.
73. Once a candidate is nominated for promotion they go through a competency-based interview lasting about 90 minutes. This may also involve a practical exercise. Two interviewers follow a set of questions which are put to all candidates.

Performance reviews and the four quadrants

74. An employee's performance review has four sections under which they are assessed. They are referred to as the four quadrants which are (1) Customer, (2) Financial and Business Delivery, (3) People and (4) Risk and Control (for example shown in the claimant's appraisal document starting at page 130).
75. Since the financial crisis, the FCA has directed that banks should no longer set specific income driven targets. The respondent in evidence told us that they respect this direction but that "informal expectations" continue to be set. These are not hard targets.

The 2016 promotion round

76. The claimant received a performance rating of 4 for the 2015 performance year. She was put forward for promotion in 2016. She had been rated 3 for both 2014 and 2013. The rating of 4 allowed her to be nominated for promotion and she was nominated by her line manager Mr Waters.
77. The claimant attended the competency-based interview for promotion. Her interviewers were Mr dos Santos and Mr Neil Phelps, Head of Media. She did not perform well at interview and did not pass the benchmark for promotion. Mr dos Santos gave interview feedback to the claimant, which she accepted.

78. The claimant did not dispute that in 2016 she did not perform well in the promotion interview. We saw this for example in the transcript of her telephone call with Mr Owen on 6 October 2017, referred to in more detail below (page 585C).
79. The claimant withdrew the allegation in relation to the 2016 promotion round (allegation (i)).
80. Mr dos Santos evidence on the interpretation of the promotion criteria was that it was for their “*strong performance candidates*”. Based on his evidence we find that he has never nominated an individual, male or female, unless they had a 4 in the previous year. He said that if this requirement dropped to a 3, they would have 80% of the staff eligible for promotion (combining staff with grades 3 and 4).
81. Ultimately it is for the line manager, in this case Mr Waters, to make the nomination for promotion. Mr Waters’ interpretation was that in isolation a 3 rating would not necessarily preclude someone from nomination, but it would have to be in the context of an otherwise consistently strong record over the past 3 years. As a minimum he would reasonably expect this to be evidenced by at least more 4 ratings than 3 ratings. He said that as the claimant’s last three-year trend was 3, 4, 3, he did not see that she met the criteria or that her nomination in 2016 would mean automatic nomination in 2017.
82. The promotion criteria state that “*typically*” the candidate has to have achieved a rating of 4 and no less than 3. We find this leaves room for discretion; it is not a hard and fast policy. It goes on to say (page 968) that “*Individuals should have a consistently strong record over the last 3 years. When nominating someone ensure that they have demonstrated a consistent performance and that your ExCo member is supportive*”. The ExCo (Executive Committee) member for the claimant is Mr dos Santos and he has never nominated unless the candidate had a 4 in the previous year.
83. Even if Mr Waters put forward a candidate with a 3, that candidate needed the ExCo member’s support. We find, based on Mr dos Santos’ evidence, that this policy was consistently applied across men and women in his department of Commercial Banking. We find that this was never comprehensively explained to the claimant, who interpreted the criteria as saying that anyone with a 3 could be promoted, provided they were a strong 3. She did not understand this to mean that she needed a 4 for her most recent performance rating.
84. Employees needed ExCo member support in order to go forward for promotion in any year and what was not made clear to the claimant was the way in which he interpreted the policy in Commercial Banking and the requirements that he determined were necessary to secure his support.

The claimant’s performance in 2016

85. The claimant's view was that her performance in 2015 had opened up the door for promotion and all she needed to do was to maintain good performance and "*nail the interview*" (her witness statement paragraph 137). She also accepted (statement paragraph 133) that she knew that nomination for promotion was not guaranteed. We find that the claimant knew that nomination was not automatic for 2017 (based on her 2016 performance) even if she maintained strong performance.
86. The respondent does not dispute that the claimant had a good year in 2016. On 8 November 2016 (page 89) the claimant sent an email to Mr Waters explaining why she thought she had gone "*above and beyond*" in 2016 and made some comparisons with other members of her team. Mr Waters replied, correctly, that it was inappropriate for him to set out what other members of the team had done and what issues they had to address.
87. One of the matters the claimant raised with Mr Waters was that she thought she was given a disproportionate number of TS's files compared to the rest of the team. TS was promoted into a Head Office role and his accounts were distributed around the PFP team. The claimant accepted in oral evidence that comparator PQ received a larger number of TS's files with a smaller income. The claimant received a relatively low number of TS's files but it was accepted by the respondent that the number of files and the amount of work involved was not necessarily the same. The claimant considered that she was given the 'lion's share' of TS's work. Mr Waters accepted that it was a lot of work.
88. On a first draft of the performance grades for 2016 Mr Waters gave the claimant a 4. He gave 5 members of his team, out of 13, an initial grade 4 rating. This was 38% of his team. His manager Mr dos Santos saw this as considerably over the bell curve guidance and it was not justified by the team's overall performance which was assessed at a 3. Mr Waters had nominated 4 out of 5 of his AD's as a grade 4.
89. These initial gradings were subject to the calibration process. The evidence of Mr dos Santos was that during calibration it became clear that Mr Waters had been far too generous in his initial assessment of his AD's. Mr Waters was asked to re-calibrate and he marked three of his AD's down to a 3. This was the claimant and two men. The only AD to retain a grade 4 was the claimant's comparator AW. Mr Waters also regraded one female member of staff (at a lower grade than the claimant) upwards from a 3 to a 4.
90. The claimant did not know at the time about her initial grade and the calibration exercise. She had this information by the time she prepared her witness statement (paragraph 143).
91. Mr Waters' email to Mr Dos Santos of 10 November 2016 (pages 90A to 90D) set out his reasoning following the calibration exercise for 2016. For the claimant he concluded: "*Great networking activity with sales*

predominantly deposit led but it appears after migration adjustments potentially limited growth so not a 4 but based on sales delivery definitely a strong 3" (page 90B). A migration adjustment is made when clients are moved from one portfolio to another.

92. The final version of the claimant's performance review for 2016 was at pages 140 – 151. AW's final performance review was at pages 130 – 139.
93. AW was not nominated for promotion in 2017 in any event. The claimant was not less favourably treated than AW in terms of not being put forward for promotion in 2017. The claimant named DM as her comparator as he was the only person nominated from Commercial in 2017. There were other employees at AD level who were awarded a 4 and were not put forward for promotion in 2017.

Comparator DM – the 2017 promotion round – allegation (iii)

94. In 2017 the only AD candidate nominated for promotion by the respondent's Commercial Business was DM, the claimant's comparator.
95. DM's performance grades for the three preceding years were as follows: 2014 - grade 4; 2015 - grade 3 and 2016 - grade 4. The claimant's grades for those three years were as follows: 2014 - grade 3; 2015 - grade 4 and 2016 - grade 3 (a rating which she challenged). DM therefore met the criteria as interpreted by Mr dos Santos, which we have found was applied consistently. DM had a 4 in his most recent performance year.
96. In addition to his last 3 years performance ratings, DM had grown his client portfolio in 2016 by 22% in lending and generated income of £3.14m from his portfolio. This was above the AD level of £2.5m and close to the Director target of £3.5m. DM also started 2017 with high levels of lending. Mr dos Santos described him as the "stand out" candidate.
97. Our finding is that the claimant was not less favourably treated than her comparator DM who had more grade 4s in the last three years, had a 4 in his last performance year and was the stand out candidate. The promotion of DM and not the claimant was not related to her gender. It was performance related.

Wrongly awarding the claimant level 3 for performance in 2016 – allegation (ii)

98. The claimant sent an email to Mr Waters on 27 April 2017 saying that she wanted to be put forward for promotion in 2017 (page 222). She also noted some of her financial highlights for 2017 (the next performance year) even though it was still only April. This included her considerable success in securing lending business with client R.
99. Mr Waters replied on 28 April 2017 (page 221) saying that her 2016 rating of 3 was never a guarantee of a promotion nomination. He made positive

- comments about her 2017 performance to date.
100. The claimant replied on 28 April 2017 at 09:21 (page 220) saying that she could not see why she was not eligible for nomination for promotion in 2017. Mr Waters replied that her three-year rating trend of 2014 (3) 2015 (4) 2016 (3) meant that she was not eligible for promotion.
 101. The claimant consulted HR and her union. HR told her, correctly, that the promotion criteria did not specify that a level 4 was required. This goes back to our earlier finding that the interpretation of the criteria in Commercial Banking was never comprehensively explained to the claimant.
 102. The claimant requested a meeting with Mr Waters who told her that the rating trend of 3, 4, 3 was insufficient. Mr Waters was supportive of the claimant speaking with Mr dos Santos on the matter and the claimant submitted a paper to Mr dos Santos setting out her reasons why she thought she was eligible for promotion (pages 234 – 236).
 103. The claimant did not raise sex discrimination in that document. She does not assert that she did. She said that she would like the matter to be resolved informally. The claimant had a meeting with Mr dos Santos on 18 May 2017. Mr dos Santos made a note of that meeting which was at pages 237 – 238.
 104. On 23 May 2017 the claimant sent an email to Mr dos Santos with a copy to Mr Waters thanking them both for their time in the recent meetings. She said: *“Before I go into detail, I want to be clear, this is not a personal issue with Dave Waters”* (page 282) and in conclusion said: *“my grievance is not about individuals* (page 284). Once again she set out her views on why she should be nominated for promotion in 2017. Mr dos Santos said that he would take HR advice and after doing this he replied on 31 May 2017 saying that the next step would be for the claimant to raise a formal grievance (page 281) and this would allow someone from outside the Department to look at the case.
 105. Awarding a performance grade involves a level of management discretion. The line manager assesses the employee under the four quadrants set out above and awards a score for each. Mr dos Santos told the tribunal that the second quadrant, Financial and Business Delivery, was of particular importance to the respondent. There are objective metrics for all quadrants although it is more difficult to measure Risk and Control (the fourth quadrant). Performance is also relative to others within the same grade because of the bell curve and calibration exercise.
 106. In his email to the claimant of 2 June 2017 (page 281) Mr dos Santos gave information to the claimant to show her position against her peers on a number of key measures. In new business returns she was 9th out of 17 AD’s in Commercial (about midway); overall she was ranked 28th out of 48 RMs, again indicating that she was in the middle of the peer group and

consistent with a grade 3. For Net New Lending she was 12th out of 17 AD's and for revenue growth, 5th out of 17, albeit the bulk of the uplift was from accounts migrated into her portfolio during the performance year. We find that this is consistent with a level 3 of performance.

107. The calibration exercise, as we have found above, affected men as much as women. The claimant was downgraded from Mr Waters' original 4 to a 3 as were two of her male colleagues. One woman was upgraded from 3 to 4, at a lower grade than the claimant. AW's rating was retained at 4 after the calibration exercise.
108. By way of example under the Customer quadrant, AW was given 80% for overall client satisfaction and 100% for Commercial Banker satisfaction and the claimant was given 100% for both. We were told that AW would have been given 100% for overall client satisfaction, but for one client scoring a 3 due to the time taken to sort out that client's personal mortgage and this was not within AW's remit. The respondent's evidence was that personal clients sometimes took the opportunity to feedback on personal matters within the corporate feedback process.
109. The Commercial Banker (CB) score was considered more important because it rated the performance of the Relationship Manager whereas the overall client satisfaction score measures client satisfaction with all departments of the bank and not just with the RM. We find that the CB score is therefore more reflective of individual performance and that is why it weighted more heavily in the performance review.
110. In the Financial quadrant we were assisted by Mr Waters' email of 10 November 2016 (page 90A) sent to Mr dos Santos as part of the calibration exercise. We saw that NNL (New Net Lending) where the claimant was at -£500,000 and AW was +£3.2million.
111. That amount of £3.2million did not include a loan of £2.8million that AW had arranged whilst in HHI. Mr Waters' oral evidence was that in compiling the table on page 90A for Mr dos Santos, he deliberately excluded the £2.8m loan that AW arranged when in HHI so they could be clear of his performance notwithstanding this. The £2.8m loan stayed in HHI and discretion was exercised to give AW credit for the income arising on it for the remainder of the performance year (Mr dos Santos supplementary statement paragraph 6). Mr dos Santos was keen for AW to transfer to PFP and had therefore agreed with AW that he be given credit for this new lending for the remainder of 2016. Even without this AW's performance for NNL was £2.8m (this was on the S2 deal).
112. For revenue growth AW had £2.131 million against a base line of £1.865 million. Based on page 90A the claimant's base line figure was £1.543m and by November 2016 she had achieved £1.8m including migrations in from TS portfolio. -£0.80m was inherited debt from TS portfolio.
113. In his cross-examination Mr dos Santos told us that they wanted to grow

the lending book which is why the NNL figures were considered to be an important metric when assessing performance. We also saw that “Male 2” on page 90A had NNL of £5.5m in 2016, substantially above the claimant.

114. In the claimant’s 2016 appraisal (page 145) her income was £1.8m based on the November 2016 figures. For AW (page 134) his income figure with the benefit of the S2 deal is £2.131m. This would clearly inform the starting point for the performance review. The claimant disputed the figures and took us to page 260, an email from Mr Waters to Mr dos Santos on 27 June 2017. Her revenue figure was increased to £1.99m after additional analysis following comments she had made. We find that the £1.99 figure reflected year end rather than the November 2016 figures.
115. AWs figure was £2.131 for the same year and the claimant said his figure was wrong because at page 1286 we had AW’s 2017 appraisal, recording his revenue for 2016 as £1.953m as the baseline. Mr dos Santos in his supplementary statement (paragraph 4) explained that the total revenue for the claimant for 2016 was £1.970m (page1212) and for AW was £2.056m (page 1218f). That figure of £2.056 was manually adjusted for client S2 income bringing AW to the figure in his appraisal of £2.131m.
116. We find that even without the S2 adjustment AW achieved slightly more income than the claimant in the performance year 2016.
117. There was equivocation about the correct way to measure financial performance in 2016. The claimant had raised issues with her managers and was not convinced that the right figures had been used. At this hearing, when we were told about the adjustment for AW on the S2 deal (page 1294), we noted we did not have the background income figures to understand what had been done. We requested Mr dos Santos supplemental witness statement to assist us in understanding the figures.
118. Although the claimant had named PQ as a comparator on this issue (ii) we were not given any detailed evidence on PQ’s performance or his figures for the comparable period. PQ was awarded a 3 for 2016, the same as the claimant (table page 1168-9). The claimant had no less favourable treatment than PQ on issue (ii).
119. It is not the role of the tribunal to reappraise these individuals. We have to consider whether the claimant was given a lower grade than AW because she was a woman and not whether the appraisals were done with ultimate precision.
120. On what we have seen, we find that the claimant’s performance was slightly below that of AW. We find that the managers engaged with the figures, exercised discretion and it was not gender tainted. The claimant was mid-ranking against her peer group. The respondent has provided justification for their decisions and a rationale (for example at page 90B and 90C).

121. The claimant considered that she performed better on quadrant 3 of People and we make further findings on this below under issue (xi). Our finding is that the second quadrant of Financials weighed most heavily with the respondent, across the board. This is an approach which they are entitled as a business to take. It affects men and women equally.
122. We find that the claimant was not treated less favourably in the performance rating of 3 because she was female. It was a rating given based on her performance. It was not related to her gender. Her performance grade for 2016 was made known on 30 January 2017 (her statement paragraph 181). She had not raised her grievance when she was given the 3 rating for her 2016 performance.

The claimant's grievance of 21 July 2017

123. On 21 July 2017 the claimant raised a grievance in relation to her pay and lack of promotion (pages 369-382). It was set out in a template document. It was arguable as to whether the claimant raised in that document any allegation that there had been a contravention of the Equality Act 2010. She referred to being the only woman RM in commercial banking (page 371) and said that she felt that the promotion procedure was contrary to the Bank's values such as being a Great Place to Work and on Diversity and Inclusion (page 372).
124. We are not required to make a finding as to whether the claimant said enough to amount to a protected act, because the respondent conceded that it was a protected act. Mr Waters' evidence was that he regarded it as a discrimination complaint.
125. The grievance meeting took place on 30 August 2017 and the notes were at page 467. The claimant's amended version of the notes was at page 550. The grievance was heard by Mr Brian Owen, a Director. The claimant had a union representative at that meeting, Mr Alex Page. At the end of the meeting Mr Owen explained that he was going on leave for two weeks and the claimant was also on holiday in September 2017 so they agreed that the matter would be dealt with after the holidays.
126. Following the meeting the claimant sent further information to Mr Owen by email (page 472 – 473). Mr Owen conducted a telephone interview with Mr Dos Santos on 26 September 2017

The grievance outcome – allegation (iv)

127. Mr Owen sent his grievance outcome letter to the claimant on 29 September 2017 (pages 563 – 568). In summary his findings were:
 - *You were not treated unfairly. Whilst you were told incorrectly that a level 3 appraisal rating makes you ineligible for promotion, your performance against your peer group meant that other staff were more suited to promotion in 2017.*
 - *Your lack of development is contrary to the bank's values and I believe that*

further steps should have been taken to support your development following your unsuccessful promotion application in 2016. However, I've seen nothing that would give me any cause for concern that any support has been deliberately withheld from you because of your gender.

- *Managing expectations is the responsibility of you and your manager and both could have done more to make sure motivators and expectations were understood.*
- *An appeal against your 2016 appraisal rating should have been made by you by 15 April 2017 following the bank's appeal process. However, having reviewed your 2016 performance, I do consider that your 2016 appraisal rating was correct and that there is a robust calibration process for reviewing and challenging appraisal ratings which was followed.*

Donna, it is clear to me that you are dedicated and hard-working. Your managers have also expressed that you are a valuable and hard-working member of the team.....

128. Mr Owen made the following recommendations. He said he would be feeding this back to her managers. We find as a fact that this did not happen. He recommended that a detailed development plan be agreed and worked through with an outcome that saw the claimant ready to be considered for promotion at the next opportunity. He suggested that she give particular focus to her interview skills so that she would be better prepared for that element of the process.

129. He said: *"You should be considered for promotion provided you have an appraisal rating of three or higher in 2017 but note that being put forward does not guarantee your promotion and you will be expected to pass the required standards."* He also recommended that the claimant be interviewed by a team of independent managers.

130. He concluded by saying:

"Whilst I will be feeding back to management areas where I think things could have been done differently, I don't believe that there has been any deliberate action taken to hold you back and I do recommend that you assume positive intent and work with your managers to achieve your ambitions and I take this opportunity to wish you every success for the future."

131. The claimant understood Mr Owen's recommendation to mean that she would automatically be put forward/nominated for promotion the following year provided she achieved a performance rating of 3. Mr Owen's evidence was that if he had meant she would "automatically" be nominated for promotion, he would have said so. We accepted this evidence. He said that he wanted to highlight that it was not essential to achieve a grade 4 in order to be nominated for promotion. It was not within his gift to nominate her for promotion.

132. The claimant was given a right of appeal within 14 calendar days. She lodged her grievance appeal on 11 October 2017 (agreed chronology - pages 569-577).

133. The claimant submitted that it was not credible that Mr Owen's

recommendations were not put forward to her managers. Mr Owen's evidence was that after his grievance outcome he had a discussion with his HR contact Mr Stephen Allcock and he was told that HR would have a discussion about what to do next and come back to him. He said that once the claimant appealed his decision, his recommendations were held in abeyance pending the outcome of the appeal. This was because the claimant was not satisfied with the outcome.

134. The grievance decision was not put as a claim of harassment. We consider and find that Mr Owen's decision was fair and reasonable. We find that he would have made the same decision for a hypothetical man who had not been satisfied with his performance review. We had no submission from the claimant as to how the grievance outcome would have differed in the case of a man. The point was not explored with Mr Owen as to what he would have done differently for a man. The grievance outcome goes to the same issue as 2016 appraisal rating in that the claimant considered that she deserved a 4.
135. We find that the grievance decision was not made because the claimant was a woman and she was given no less favourable treatment than a hypothetical man. It was not related to her gender.
136. The claimant had to raise a grievance in order for there to be grievance outcome. We find that the outcome was not a detriment for raising the grievance, it was a properly considered and reasoned outcome on the facts presented to Mr Owen.

The telephone conversation between the claimant and Mr Owen

137. Prior to lodging her grievance appeal, on 6 October 2017 the claimant telephoned Mr Owen for a conversation about his grievance decision. The call was recorded. It is not necessary for us to make a finding as to who recorded it but we note that the respondent is a bank and private investment house offering regulated products, so that it is not unusual for calls to be recorded. We draw no conclusions one way or the other from the fact that that call was recorded and transcribed.
138. The transcript of the call was at page 585A-585D. At the start of the call the claimant said that she appreciated what Mr Owen had done and his attention to detail and said that she did not really want to go through the appeals process. She told Mr Owen that the union were encouraging her to do so; she wanted a few informal words with him to tell him "*where [she was] at*".
139. Mr Owen said it was an off the record conversation. He told the claimant that he thought she could well make Director and urged her to "*keep the end in mind*". He said "*..... In an ideal world everyone would do the right thing and treat everybody the way they should and everything else, but it simply doesn't and that doesn't just go for you as a woman as you know....It goes for me being a bit older and.....Chr[xx]t knows what else*

or face doesn't fit

140. He told the claimant that he was not trying to dissuade her, we find from presenting an appeal and if she felt passionate enough she could take it to the *"nth degree"* or take a deep breath and go for the promotion again. He also said : *"you don't want to mark your card"*.
141. The claimant acknowledged in that conversation that she did not perform to her best *"last year"* meaning in the 2016 promotion round. Mr Owen acknowledged that some lessons needed to be learned by senior management.
142. Our view of this call is that Mr Owen was trying to be supportive of the claimant and encourage her in the face of what had been a difficult process for her. It may have been unwise of him to have had that discussion but we find that his intention was to be supportive.
143. In terms of the comments that he made, we find that he was not saying personally that her *"face didn't fit"*; he was acknowledging that the bank still had some way to go to achieve the diversity that they are seeking. He referenced his own age in connection with this. We find that he was not acknowledging that he discriminated in his grievance decision and he was not encouraging her to leave. He reminded her that this was something she could do, as can any employee who is unhappy and he was acknowledging that the respondent needed to take more steps to make the workplace more inclusive. We accept that he said *"you don't want to mark your card"* which the claimant relies upon for the victimisation claim. He was speaking about the future and where she wanted to go next and we deal with the individual complaints below with this in mind.

Mr Waters' year end comments for 2017 - allegation (v)

144. The claimant's case was that Mr Waters made "oppressive, disparaging unreasonable" end of year comments in her 2017 Performance review and marked her down as a grade 3.
145. We find that she telephoned Mr Waters on 20 December 2017 about her 2017 performance review. In evidence, the claimant admitted that in that conversation she agreed with Mr Waters on her grade 3 rating. She said in oral evidence that this was because she understood that she was going to be put forward for promotion. She agreed and we find, that she did not say this to Mr Waters during the call. All he had to go on, was her agreement with the performance rating of 3. She admits that she did not tell Mr Waters that she thought she deserved a 4. Mr Waters' note of the call, set out in an email to Mr dos Santos on the same day (21 December 2017) was at page 897.
146. The comments relied upon as being "oppressive, disparaging unreasonable" and thus discriminatory, were not clearly set out for us. We therefore considered the claimant's Particulars of Claim (page 15

- paragraph 21), paragraph 466 of her statement and paragraph 136 of her submissions.
147. The claimant referred to comments about failed interviews at Director level; accusations of exaggerating revenue and performance, reference to delays in supplying information for the year-end review; data gaps and painting her in a bad light. We find that painting her in a bad light is an overview of the comments she objects to.
 148. On the issue about failed interviews, the comment was on page 893, which was the first draft of her performance review for 2017 – the final version was at page 1070. It said that she had been unsuccessful at 3 interviews. In the final version (page 1080) the reference to 3 unsuccessful interviews was removed. We find that the process is designed so that the manager can make provisional comments and the employee can respond. This is what happened. Mr Waters agreed with the claimant and amended the comment in the final version. There was nothing oppressive, disparaging or unreasonable about this, when it was a provisional comment, deleted upon the claimant's observations.
 149. On exaggerating revenue and performance, this focussed on pages 897 and 911. Page 897 was Mr Waters' note of the claimant's call on 20 December 2017 where she complained that he said she had exaggerated Business Opportunities. Page 911 was a written complaint to this effect. We understood this to be a reference to Mr Waters' comment on page 1083: *"I have referenced Donna's comments for more up to date data but in the time available it has not been possible to check and validate all apparent data disparities"*. This was put to Mr Waters in cross-examination and he said that he could not reconcile her data with his.
 150. We saw throughout this case that there were difficulties in reconciling the data and agreeing what it should be. We find that Mr Waters' did no more than recognise this with his comment and there was nothing oppressive, disparaging or unreasonable about this. It was factual. He could not reconcile the data she relied upon against his own. We find he was not accusing her of exaggerating.
 151. The claimant complained about reference to delays in supplying information for the year-end review. This was about Mr Waters setting a timetable for his own team for appraisal comments that fitted with his annual leave arrangements. We find that the claimant was late against this timetable. She submitted by the date but the document was incomplete so she was late in fully complying. We find that Mr Waters was not being oppressive, disparaging or unreasonable when he mentioned this.
 152. There was a complaint about "data gaps" in the first draft appraisal (page 896). By the final version of the appraisal at page 1083 Mr Waters' said he had been unable to reconcile the disparities. We rely on our findings above in relation to this.

153. Where a comment was removed by the final version we rely on our finding above in relation to the process.
154. We find that the comments made by Mr Waters were not oppressive, disparaging or unreasonable and this issue fails on its facts.

The data breach – allegation (vi)

155. At 9:09 hours on 21 December 2017 the claimant sent Mr Waters a lengthy email about her year-end performance for 2017. It named specific clients and was copied to her personal email address which constituted a data breach. Mr Waters replied, raising the matter of the breach and copied his own line manager, Mr dos Santos.
156. The claimant told Mr Waters that she had copied her personal email address and also forwarded it to her union representative who works for RBS and has an RBS email address, therefore within the Group but not within the respondent. It attached her PEF divulging client names. The claimant accepted in evidence that it contained information that was not publicly available and included confidential client information. Mr Water's evidence was that a breach such as this would normally justify a formal disciplinary warning.
157. Mr Waters took advice from HR as to what to do about the data breach. The HR advice was for formal disciplinary action (pages 960 - 961). As a management team, Mr Waters, his manager Mr dos Santos and his manager Mr Williams decided that the claimant was under pressure with her grievance appeal and they chose to take a more lenient approach.
158. The claimant and Mr Waters originally planned to meet to discuss the data breach on 5 January 2018 (see page 1016). The meeting was rescheduled to 23 January and a file note was taken and was subsequently marked up by the claimant (page 1065). This was the record of their meeting to discuss the matter. The claimant complained that there was a failure to follow due process in that regard and expressed unhappiness that the informal discussion note would remain on her file permanently. We find that as it was no more than an informal discussion between her manager and herself, there was no "due process" to be followed.
159. The claimant accepted in evidence that she should not have sent this email to her personal email address. She accepted that she "*did wrong*", to quote her oral evidence.
160. Mr Waters and Mr dos Santos accepted the pressure on the claimant with her grievance procedure. They took action which was more lenient than that recommended by HR and the claimant avoided disciplinary action. The respondent said that the outcome was better than if the grievance had not been submitted as this is what caused them not to go to a formal written warning.

161. The claimant relies on this as harassment related to her gender, victimisation and direct discrimination. Her evidence on this issue wavered. She initially said that if she had been a man she would “just have had a verbal warning or a quiet word” and then said it would just have been a “quiet word” and nothing else.
162. The claimant’s case was that she was issued with an informal warning and that there was failure to follow due process in that regard.
163. The claimant cited AW as her comparator on this issue for direct sex discrimination. She did not know whether AW committed a data breach; we had no evidence that he did so we find that he did not. We find no less favourable treatment than her comparator. He was in materially different circumstances because he did not commit a data breach.
164. We find that because of the sector in which they operate, the respondent could not ignore this matter. We find that HR would have given exactly the same advice had the claimant been male. We find that the action they took was not a detriment because she had lodged her grievance. They treated her more leniently in recognition that the grievance process was putting her under some pressure. It was not action in any way related to her gender.

Mr Waters’ “derogatory comments” during the appeal process – allegation (vii)

165. Within the grievance appeal process, referred to in more detail below, Mr Waters was interviewed by the appeal officer Mr Neville. During the course of that interview there was a question and answer as follows (page 649):

*MN - Did Donna express dissatisfaction with her 2016 End of Year Rating to you?
DW - Every rating Donna has had she discusses with me her dissatisfaction.*

166. It was put to Mr Waters that this was sexist gender stereotyping that women complain all the time. Mr Waters said that he had absolutely no awareness that this was a gender stereotype, namely that women complain all the time. It was put to Mr Waters that he was treating her negatively because she had complained about sex discrimination or because she was a difficult woman. He denied this.
167. We find that this was not a gender specific comment. Mr Waters said that on every rating, the claimant discussed with him, her dissatisfaction. There was no gender related aspect to the comment. It was about the claimant as an individual. We considered it was said in neutral terms. He reflected back the question he had been asked. It was put to Mr Waters that the claimant was not unhappy with her reviews in 2013, 2014 and 2015. His evidence was that the claimant was dissatisfied with all her performance reviews.

168. We find that there was nothing gender specific about the comment made to Mr Neville. We find that it was a comment about the claimant in person and her discussions with him about her performance ratings. We find that Mr Waters would have made the same or a similar comment to Mr Neville about a hypothetical man who had expressed dissatisfaction with his performance appraisals. The comment was not made because the claimant had raised a discrimination complaint. Although it was a comment made in a grievance process, it was simply an answer to a direct question and which to Mr Waters' recollection was factually true. It was not a comment related to the claimant's gender. It was an answer to a question, which was not gender specific.

The grievance appeal– allegation (viii)

169. As set out above, the claimant lodged her grievance appeal on 11 October 2017. The appeal officer was Mr Mark Neville an Executive Director. The claimant complains about the negative appeal decision and what she described as the reversal of the grievance outcome recommendation regarding the automatic trigger for nomination for promotion.
170. It is not in dispute that Mr Waters was not interviewed by Mr Owen in the first stage grievance process. In early November 2017 Mr dos Santos provided clarifying evidence for the appeal process and Mr Waters was interviewed by Mr Neville on 6 November 2017. The interview notes were incorrectly dated 6 October 2017 (page 646). Mr Dos Santos was interviewed in connection with the appeal on 13 November 2017 (pages 641 – 642).
171. The grievance appeal hearing took place on 7 November 2017 and the notes were a page 668 – 676. The claimant was accompanied by a union representative Ms Culkin. At the end of the hearing the claimant's union representative requested a copy of all statements and documents to be shared with the claimant at the earliest opportunity and Mr Neville acknowledged this. At the end of the hearing the claimant and her representative were told that a decision would be made by Mr Neville following some further investigation and they would receive the outcome in writing.
172. On 22 December 2017 the claimant sent an email to Mr Neville, pending the appeal outcome, to complain about comments she had received from Mr Waters in relation to her performance for 2017. She forwarded her email of 21 December 2017 to Mr Waters - it was a lengthy email complaining about Mr Waters' year end comments on her performance (pages 934-937).
173. Mr Neville forwarded the email to Mr dos Santos saying: "*for information. I think this falls into bau, that I will comment in my letter.*" "*Bau*" stands for business as usual. It was put to Mr Neville that he was just shutting down sex discrimination. He strongly denied this saying that the email correspondence of December 2017 did not fall within the remit of his

- appeal and he simply wished to make Mr dos Santos aware of the matter.
174. The comments forwarded by Mr Neville to Mr dos Santos were the claimant's comments about her 2017 appraisal and what was before him in the grievance appeal was the 2016 appraisal. We agree and find that the comments he forwarded were not within the remit of his grievance appeal and therefore were to be regarded as "business as usual" as those most recent comments had to be dealt with in the usual way. We find that this was not, as put to Mr Neville, the "shutting down of sex discrimination".
175. The appeal outcome was set out in a letter dated 16 January 2018 (page 1001 – 1006). In summary Mr Neville found that the claimant had not been treated unfairly in her 2016 performance rating and the fact that she was not put forward for promotion in 2017.
176. One of Mr Neville's findings (page 1004) was "*I do not feel it is appropriate for you to be automatically reconsidered for promotion in 2017.*"
177. He said in summary:
- "Whilst it is clear that your portfolio had client migrations in and out during the year, I am confident that senior management took this into account when calibrating your total 2016 performance, across the scorecard. A robust calibration process was followed, taking into account your performance against your peers, not only in your current team, but also across the wider Commercial business.*
- In terms of the promotion process, it is clear that the minimum rating to be eligible for a nomination for promotion is a level 3 performance. However, the business has to overlay this by comparing like-for-like performance across teams and business areas, to ensure that the candidates with the strongest overall performance are nominated. This is a business decision, and I am satisfied that a robust calibration took place in Coutts Commercial.*
- On the basis of my findings I do believe that the decision not to consider you for promotion in 2017 was taken in a fair and balanced manner.*
- I hope that with a strong PDP and development support, this will place you in a good position when the [in] next opportunity presents. I am satisfied that all processes have been fairly followed and you have been fairly calibrated against your peers. I have seen no evidence of unfairness, inequality or discrimination during my consideration of your appeal."*
178. The claimant was told that she had no further right of appeal and that Mr Neville's decision was final.
179. The claimant said that this was a reversal of the grievance outcome recommendation regarding the automatic trigger for nomination for promotion. Mr Owen at the first stage grievance, said (outcome letter page 568) that if the claimant had a rating of 3 or above, she should be considered for promotion. He made clear that this did not guarantee promotion. We find that considered is not the same as nominated.
180. We do not consider this to be a "reversal" of Mr Owen's decision. We find it is not. He said in his outcome letter (page 1004 fourth paragraph under

heading “*My findings*”): “*I again feel it is important that this recommendation is considered with the spirit with which it was intended. That you get full support in order to fully develop and prepare for the next opportunity, but I feel you should also fully understand that being put forward is not a given and it will require you to meet the minimum criteria of level 3 appraisal rating or more. Once achieved, your performance would be calibrated in line with your peers in your team, Coutts Commercial and across the wider private banking business to nominate the strongest performers*”.

181. We find that Mr Neville’s appeal outcome is a repeat of what Mr Owen said, that if she attained a 3, she would be considered for but not be guaranteed for promotion. Mr Owen and Mr Neville reflected the process as we have found above, including calibration and peer comparison.
182. We find on the facts that Mr Neville did not reverse Mr Owen’s finding on the promotion issue. As the claimant’s appeal was not upheld it was negative from the claimant’s perspective. We find that it was consistent with Mr Owen’s decision and we rely on our findings in relation to that decision.
183. We find that the appeal outcome was not made because the claimant was a woman and she was given no less favourable treatment than a hypothetical man. It was not a detriment for raising the grievance in the first place, it was a properly considered and reasoned outcome on the facts presented to Mr Neville.
184. Although not forming part of her table of allegations, the claimant complained that she was not given the support recommended by Mr Owen and acknowledged by Mr Neville. Mr Neville said in his outcome letter, page 1003: “*You also raised what you felt was a lack of support from your line manager/lack of a PDP from 2016 to 17. Whilst I agree with the original grievance outcome, I do see this as a dual responsibility between you and your line manager and would place an equal emphasis on you as an experienced employee looking to achieve promotion to have been pushing this forward with encouragement, development guidance and support provided by your manager. Given the feedback from Brian [Owen] I do hope that you have now put in place a detailed and robust development plan going forward*”.
185. We find that it was, as he stated, a dual responsibility on the part of the claimant and respondent. There was a PDP, to which we refer below, which was produced in early February 2018.

The appraisal for the performance year 2017

186. On 17 November 2017 all relationship managers (RMs) were due to submit their draft comments to their line manager for their appraisal. Mr Waters and other managers would then review the key performance metrics and agree final ratings for performance which, as usual, was

subject to the calibration process. Employees were due to submit their comments by 1 December 2017. The timetable was set out in an email from Mr Waters to the claimant and her colleagues - page 786e

Loan value draw down - allegation (ix)

187. The claimant's case was that from January 2018 and ongoing, Mr Waters discriminated against her, victimised and harassed her by not giving her recognition for loan volume draw down in either 2017 or 2018 and she relied on a hypothetical comparator. She did not compare herself with AW on this allegation.
188. This was a £5.5 million development loan where the client signed all the necessary documents at the beginning of 2017 but as their development works were delayed, they had to reschedule their draw down of the loan until the end of the year. The client only drew £963k (around £1m) by the end of the year.
189. In her 2017 appraisal at page 1076 Mr Waters noted "*R having drawn down £963k of their £5.5m facility*" he acknowledged that R had drawn down part and the balance was to follow.
190. The balance was expected to be drawn down in 2018 and this would automatically deliver £4.5m loan growth to the claimant's 2018 loan figures. We saw in an email from Mr Waters to the claimant copied into an email from Mr Waters to Mr dos Santos on 11 January 2018 the following (page 1044): "*From a Balance Sheet growth perspective you do have the remaining £4.5m to draw [on the R loan] during the 2018 performance year, although of course had the full 12 months sales revenue recognised in your 2017 performance year*".
191. The situation was unique, which we saw from Mr dos Santos' email to Mr Waters (page 1044). There was no other RM in the PFP team in a similar scenario where it was necessary to account for a loan in gradual draw down.
192. Our finding of fact is that the claimant was given recognition for the loan volume draw down for the R loan. This is clearly stated on page 1044 as quoted above.
193. From the 2016 and 2017 appraisal documents in front of us, we find that performance reviews are normally concluded in late January of each year. This means that the 2018 performance review was not in front of us. We could therefore make no finding as to whether the claimant will be given recognition for this in her year-end appraisal for her performance in 2018.
194. We could find no less favourable treatment than a hypothetical man. She had the initial recognition for it in 2017 and had the balance to draw on for her 2018 performance year. We find that the respondent approached this in a fair and reasonable manner and the claimant is wrong to say that she

had no recognition for it. It was not in any way influenced by her grievance of July 2017 and not related to her gender.

195. We noted that in submissions the claimant (paragraph 151) made a comparison with AW on this issue but this was not the pleaded case and the claimant relied upon a hypothetical comparator. We find that in any event AW did not have materially similar circumstances for a comparison to be made, as Mr dos Santos made clear that this was a unique situation.

Decision not to put the claimant forward for promotion in 2018 – allegation (x)

196. The claimant was not put forward for promotion in the 2018 round. As we have found above, the claimant accepted her rating of 3 for 2017, which went to the promotion round for 2018. The claimant relies upon a hypothetical comparator. She does not rely on AW or any named comparator.
197. We rely on our findings above as to Mr dos Santos's practice that he has never nominated for promotion unless the candidate had a 4 in the previous year and that this had not been explained comprehensively to the claimant. She accepted the 3 rating (statement paragraph 464) and had a 3 for the previous year. She had also misunderstood Mr Owen's recommendation, considering this to be an automatic nomination if she rated at 3.
198. The claimant had a meeting with Mr Waters on 6 February 2018 to discuss her career development and a PDP discussion paper was produced on 7 February 2019 (pages 1108-1109). She referred to this in her statement at paragraph 545. This PDP and the file note was handed over to her new line manager Mr Marsden. We find that the respondent had constructive discussions with the claimant designed to further her career development.
199. We repeat under allegation (x) our findings as to the claimant not being put forward for promotion in 2018, as for 2017.

Extra-curricular work activities – allegation (xi)

200. All employees in the PFP team were encouraged to carry out work which was not just income generating. The claimant accepted this in evidence. Activities other than those which were income generating were valued by the respondent and formed part of assessment in a performance review. The claimant enjoyed equality and diversity work and volunteered for this. She put herself forward as a Business Champion (page 81). She also carried out interviews as the respondent preferred, in the interests of diversity, that there be a woman on an interview panel if possible. She also delivered training in unconscious bias.
201. The claimant complained that requests were made by her line manager Mr Waters to undertake extra-curricular activities. The claimant accepted in evidence that all RM's were expected to undertake extra-curricular

- activities. She also accepted that not all extra-curricular work was requested by Mr Waters and she was doing it for her own career development.
202. She received good feedback for her extra-curricular work in her mid-year appraisal in 2017, with Mr Waters saying: *“that’s amazing thanks Donna”* (page 1077). She was happy to do the work. This was shown in her 2017 appraisal by the very high number of hours spent on CPD of 178.75 hours against the target figure of 50 (page 1078). Mr Waters commented on page 1078 that the claimant should reflect on the People activity that she undertook and what actions were having the biggest impact on her personal development under the other three quadrants. We find it was a question of balance and to put a high amount of time into one quadrant had the potential to be to the detriment of the other three.
203. The claimant complained that her new line manager Mr Marsden asked her to interview six candidates.
204. There was evidence that male AD’s did extra-curricular work of a different type that was also time consuming. The claimant did not know how much time her male AD colleagues spent on their extra-curricular work and this is why she relied on a hypothetical rather than an actual comparator. We find this telling. She could not say that any of her male colleagues were doing less extra-curricular work than herself. When examples were put to her of what her male colleagues did (eg new debt pricing methodology and cash flow modelling to improve lending risk analysis), she accepted she did not know how long that would take.
205. We find that there was no question of the claimant being singled out by management to perform extra-curricular tasks. The claimant has not shown facts from which we could conclude in the absence of any other explanation that the respondent contravened the Equality Act on this issue (xi).

Allegation (xii) not being permitted an adjustment

206. The claimant’s case was that on 24 January 2018 and ongoing, Mr Waters discriminated against her by not permitting an adjustment with the result that the reduction would have to be absorbed in 2018. Her comparator for direct sex discrimination was SW.
207. The comparator relied upon was not AW. The claimant addressed this in submissions in comparison with AW (paragraph 159 claimant’s submissions) but he was not the named comparator.
208. Mr Waters explained that a material lump sum repayment on a loan to client TT did not take place. It had been anticipated that the client would sell a lease on a Central London property and make an immediate lump sum payment against the loan. This did not happen and the loan reduced on a normal repayment programme. This meant no adjustment for any

lump sum repayment was needed. No comparator was put to Mr Waters in cross-examination.

209. The claimant did not show us any facts from which we could conclude in the absence of any other explanation that there had been discrimination. In any event we found Mr Waters explanation of what happened, to be entirely credible.

Pay and bonuses - allegations (xiii) and (xiv) and (xiii)(a) and (xiv)(a)

210. The final allegations were the failure to pay “proper” discretionary bonus and failure to pay “proper” pay rises and the comparator was AW.
211. We have set out above, under the heading “Bonus” our findings on the way in which the bonus scheme operated.
212. Our finding above is that AW was a higher performer than the claimant in the relevant years. This is why he achieved a 4 in 2016 and this affected pay 2017. The table at page 1168-9 set out the salary and bonus comparisons. Bonus was referred to as “Reward”. The claimant’s bonus for 2016 paid 2017 was £9,250 and AW for the same year was £12,500. We find that the reason for the differential is explained by his higher performance and not by gender.
213. In 2017 (paid in 2018) the claimant again had a performance rating of 3 and AW had a rating of 4. As we have found above, she accepted the 2017 rating of 3. Her bonus for that year was £7,000 and AW’s was £16,500. Male 2 in that chart received a 3 rating and a bonus of £6,000, thus less than the claimant. PQ, like AW, received a 4 rating and a bonus of £9,500, thus substantially less than AW. PQ received no bonus in the preceding year, on a performance rating of 3.
214. The claimant did not show us primary facts from which we could conclude that there was sex discrimination, harassment or victimisation in the way in which bonuses were paid. We accept and find Mr dos Santos’s evidence that bonus was based on performance and contribution. The claimant’s grievance and her gender played no part.
215. So far as pay rises are concerned, the pay matrix is set out above. We found above that AW’s salary increases by percentage for 2016, 2017 and 2018 were: 2016 – 2%; 2017 – 2.5% and 2018 – 3.3% compared with the claimant’s increases of 3.75%, 2.5% and 2.13%. Therefore, AW received a lower increase in 2016, the same increase in 2017 and a higher increase in 2018 (table page 1168-9).
216. The claimant had no less favourable treatment in pay rises in 2016 and 2017. In 2016 we saw that five men received a lower pay rise than the claimant. We were satisfied that gender was not an influencing factor in the way that pay rises were awarded and the respondent, based pay increases on the factors that we have set out in our findings above on the

pay system. The claimant's pay rises were not affected by the fact that she had raised a grievance on 21 July 2017. Any pay rises prior to that date could not in any event have been influenced by the protected act.

The relevant law

Equal pay – like work

217. Section 65 EqA provides that:

.....A's work is equal to that of B if it is (a) like B's work,.....

(2) A's work is like B's work if—

(a) A's work and B's work are the same or broadly similar, and

(b) such differences as there are between their work are not of practical importance in relation to the terms of their work.

(3) So on a comparison of one person's work with another's for the purposes of subsection (2), it is necessary to have regard to - (a) the frequency with which differences between their work occur in practice, and (b) the nature and extent of the differences.

218. For the purposes of the material factor defence, section 69 provides that

(1) The sex equality clause in A's terms has no effect in relation to a difference between A's terms and B's terms if the responsible person shows that the difference is because of a material factor reliance on which—

(a) does not involve treating A less favourably because of A's sex than the responsible person treats B, and

(b) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.

(2) A factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A's are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A's.

(3) For the purposes of subsection (1), the long-term objective of reducing inequality between men's and women's terms of work is always to be regarded as a legitimate aim.

219. If a difference is caused by where the claimant and comparator started on the pay scale, that difference does amount to a material factor **Secretary of State for Justice v Bowling 2012 IRLR 382 EAT**. Underhill P (as he then was) said at paragraph 7: *"It is in the nature of an incremental scale that where an employee starts on the scale will impact on his pay, relative to his colleagues', in each subsequent year until they reach the top. Labelling an explanation as "historical" may not be not helpful. All causes are, in one sense, historic in that they occur in the past: the real question is whether they have ceased to operate as an*

explanation for the differential complained of as at the date under consideration”.

220. The EAT in ***BMC Software Ltd v Shaikh 2017 IRLR 1074 (EAT)*** confirmed a complaint cannot succeed both as a sex discrimination claim and an equal pay claim.

Direct discrimination

221. Section 13 of the Equality Act 2010 provides that 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

222. Section 23 of the Act provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

Harassment

223. Section 26 of the Equality Act 2010 defines harassment under the Act as follows:

- (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.*
- (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.*

224. Harassment and direct discrimination are mutually exclusive – section 212(5) Equality Act 2010.

225. In ***Richmond Pharmacology v Dhaliwal 2009 IRLR 336*** the EAT set out a three step test for establishing whether harassment has occurred: (i) was there unwanted conduct; (ii) did it have the purpose or effect of violating a person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person and (iii) was it related to a protected characteristic? The EAT also said (Underhill P) that a respondent should

not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. The EAT also said that it is important to have regard to all the relevant circumstances, including the context of the conduct in question.

226. In order to fall within section 26, the conduct must be “related to” race and/or disability. Behaviour which is unreasonable or bullying, but unconnected to those protected characteristics will not therefore fall within this category. This was emphasised by the EAT in **Nazir v Aslam EAT/0332/09** (Richardson J at paragraph 69).

“The provisions to which we have referred find their place in legislation concerned with equality. It is not the purpose of such legislation to address all forms of bullying or anti-social behaviour in the workplace. The legislation therefore does not prohibit all harassment, still less every argument or dispute in the workplace; it is concerned only with harassment which is related to a characteristic protected by equality law - such as a person's race and gender.”

Victimisation

227. Section 27 EqA provides that a person victimises another person if they subject that person to a detriment because the person has done a protected act. A protected act is defined in section 27(2) and includes the making of an allegation (whether or not express) that there has been a contravention of the Equality Act.
228. The concept of detriment in victimisation claims does not require a comparator. The CA accepted in **Deer v University of Oxford 2015 IRLR 481**, a comparative exercise may be relevant when applied properly. In that case the CA made clear that the concept of detriment should be determined from the point of view of the claimant: a detriment exists if a reasonable person would or might take the view that the respondent's conduct had been to her detriment.

Burden of proof

229. Section 136 EqA deals with the burden of proof and provides that 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.
230. One of the leading authorities on the burden of proof in discrimination cases is **Igen v Wong 2005 IRLR 258**. That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved, the burden passes to the respondent to prove that it did not discriminate.
231. Bad treatment per se is not discriminatory; what needs to be shown is worse treatment than that given to a comparator - **Bahl v Law Society 2004 IRLR 799 (CA)**.

232. Lord Nicholls in ***Shamoon v Chief Constable of the RUC 2003 IRLR 285*** said that sometimes the less favourable treatment issues cannot be resolved without at the same time deciding the reason-why issue. He suggested that Tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the claimant was treated as he was, and postponing the less favourable treatment question until after they have decided why the treatment was afforded.
233. In ***Madarassy v Nomura International plc 2007 IRLR 246*** it was held that the burden does not shift to the respondent simply on the claimant establishing a difference in status or a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase “could conclude” means that “a reasonable tribunal could properly conclude from all the evidence before it that there may have been discrimination”.
234. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court endorsed the approach of the Court of Appeal in ***Igen Ltd v Wong*** and ***Madarassy v Nomura International plc***. *The judgment of Lord Hope in Hewage shows that* it is important not to make too much of the role of the burden of proof provisions. They require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other
235. The courts have given guidance on the drawing of inferences in discrimination cases. The Court of Appeal in ***Igen v Wong*** approved the principles set out by the EAT in ***Barton v Investec Securities Ltd 2003 IRLR 332*** and that approach was further endorsed by the Supreme Court in ***Hewage***. The guidance includes the principle that it is important to bear in mind in deciding whether the claimant has proved facts necessary to establish a prima facie case of discrimination, that it is unusual to find direct evidence of discrimination.
236. The Court of Appeal in ***Ayodele v Citylink Ltd 2017 EWCA Civ 1913*** recently confirmed that the line of authorities including ***Igen*** and ***Hewage*** remain good law. The burden of proof case law was most recently reviewed by the Court of Appeal in ***Efobi v Royal Mail Group Ltd 2018 EWCA Civ 18***.
237. Section 123 EqA provides that:
- (1)proceedings on a complaint within section 120 may not be brought after the end of—
 - (a) the period of 3 months starting with the date of the act to which the complaint relates, or
 - (b) such other period as the employment tribunal thinks just and equitable.
238. This is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. It is for the claimant to satisfy the tribunal

that it is just and equitable to extend the time limit and the tribunal has a wide discretion. There is no presumption that the Tribunal should exercise that discretion in favour of the claimant.

239. The leading case on whether an act of discrimination it to be treated as extending over a period is the decision of the Court of Appeal in **Hendricks v Metropolitan Police Commissioner 2003 IRLR 96**. This makes it clear that the focus of inquiry must be not on whether there is something which can be characterised as a policy, rule, scheme, regime or practice, but rather on whether there was an ongoing situation or continuing state of affairs in which the group discriminated against (including the claimant) was treated less favourably.

240. The burden is on the claimant to prove, either by direct evidence or inference, that the alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of an act extending over a period.

241. In **British Coal Corporation v Keeble 1997 IRLR 336** the EAT said that in considering the discretion to extend time:

It requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, inter alia, to –

(a) the length of and reasons for the delay;

(b) the extent to which the cogency of the evidence is likely to be affected by the delay;

(c) the extent to which the party sued had cooperated with any requests for information;

(d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;

(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

242. There is no presumption that a tribunal will exercise its discretion to extend time. It is the exception rather than the rule - see **Robertson v Bexley Community Centre 2003 IRLR 434**.

243. The decision of the Court of Appeal in **Apelogun-Gabriels v London Borough of Lambeth 2001 IRLR 116** makes clear that there is no general principle that an extension will be granted where the delay is caused by the claimant invoking an internal grievance or appeal hearing.

Conclusions

The equal pay claim

244. The respondent conceded like work. As a result of that concession our conclusion is that the claimant and her comparator did like work as

Associate Directors in the PFP team. The difficulty for the claimant is that she was paid more than any other male AD in her team save for her comparator AW. Although it was submitted for the claimant (submissions paragraph 162) that the claimant had greater skills and experience than the other male ADs, this was not put in evidence before us. What this demonstrated to us, was that there were non-gender related factors to explain the differentials in pay between the claimant and the five other men in her team. Those men did like work to the claimant and were paid less. It supports our findings that the respondent applies a non-discriminatory pay scheme.

245. In relation to AW, he transferred into the claimant's department in 2016. Mr dos Santos was keen to have AW in the PFP team and as we have found above, he honoured AW's existing salary at £60,442. This was in effect AW's starting point on the scale and following **Bowling** above, explains the differential.
246. The performance factors we have identified above, to the effect that AW was a higher performer than the claimant, his starting salary in PFP and the gender-neutral application of the pay system as described by Mr dos Santos, are material factors under section 69 EqA. The equal pay claim therefore fails and is dismissed.
247. Although the claimant sought to make an equal pay claim backdated for six years to May 2013, the only case she advanced in evidence related to her comparison with AW from the point at which he joined the PFP team. We had nothing upon which to base a finding that the respondent breached the equality clause in relation to his work in HHI and for that reason any claim relating to the period prior to 2016 also fails.
248. In relation to the equal pay claim on bonuses, the claimant did not establish primary facts from which we could conclude, in the absence of any other explanation, that there had been pay discrimination in breach of the statutory equality clause. The burden of proof did not pass to the respondent.
249. The equal pay claim fails and is dismissed.

The claims for direct sex discrimination, victimisation and harassment

250. We summarise our findings as made above. Allegation (i) was withdrawn.
251. Allegation (ii), that the claimant was wrongly awarded a three rating for the performance year 2016 with comparators AW and PQ, fails on our finding that find that she was not treated less favourably in the performance rating of 3 because she was female. We found that it was was a rating given based on her performance and not related to her gender. It was not therefore direct discrimination or harassment related to her gender. She had not raised her grievance when she was given the 3 rating for her 2016 performance. She had therefore not done the protected act when she was

given that rating and the victimisation claim therefore fails.

252. On allegation (iii) our finding was that the claimant was not less favourably treated than her comparator DM' in the promotion round for 2017. He had more grade 4s in the last three years, a 4 in the last performance year and was the stand out candidate. The claimant's performance rating of 3 was not awarded because of her gender and our finding above was that Mr dos Santos never nominated for promotion unless the candidate had a 4 in the previous year and that this was never comprehensively explained to the claimant. Our finding above is that this was not less favourable treatment because of the claimant's gender, it was not related to her gender and it was not because she had lodged a grievance. The claims on allegation three fail and are dismissed.
253. On allegation (iv) we found that the grievance outcome was not a detriment for raising the grievance, it was a properly considered and reasoned outcome on the facts presented to Mr Owen. It was not less favourable treatment because the claimant was a woman and it was not related to her gender.
254. Allegation (v) failed on its facts.
255. On allegation (vi) we found that the treatment of the claimant on the data breach was not because of her gender or related to her gender. She admitted that she "*did wrong*". The respondent could not ignore the matter. We also found that on the victimisation claim, the respondent treated her more leniently because they recognised the pressure that she was under within the grievance process. It was therefore not addressed detriment for raising a grievance.
256. On allegation (vii) we found no less favourable treatment in the comments made by Mr Waters to Mr Neville. It was not because of, or related to, her gender. Although it was a comment made within a grievance process it was not a detriment for raising the grievance, it was a direct answer to a question put by the grievance appeal officer.
257. On allegation (viii) we found is the fact that Mr Neville did not reverse Mr Owens findings regarding an automatic trigger for the nomination for promotion. We found that his appeal outcome was not made because the claimant was a woman and she was given no less favourable treatment than a hypothetical man. It was not a detriment for raising the grievance in the first place, it was a properly considered and reasoned outcome on the facts presented to Mr Neville.
258. Allegation (ix) failed on the facts. We found that the claimant was given recognition for her loan volume drawdown in 2017 and the 2018 performance review process has not yet completed and the evidence was not before us so we could find no discrimination in relation to 2018.
259. On allegation (x), the decision not to put the claimant forward for promotion

in 2018, we repeated our conclusions as to the reasons why the claimant was not put forward in the 2017 round.

260. On allegations (xi) and (xii) the claimant did not show us any primary facts from which we could conclude in the absence of any other explanation that there had been discrimination. The burden of proof did not pass to the respondent.
261. Allegations (xiii) and (iv) related to bonuses and pay rises. On bonuses, the claimant did not show us any primary facts from which we could conclude in the absence of any other explanation that there had been discrimination. The burden of proof did not pass to the respondent.
262. On pay rises in 2016 and 2017 we were satisfied that gender was not an influencing factor in the way that they were awarded. We found that pay increases were based on the factors set out in our findings on the pay system. The claimant's pay rises were not affected by the fact that she had raised a grievance on 21 July 2017. Any pay rise prior to that could not have been influenced by the protected act.
263. On the harassment claim, we have found that the acts relied upon were not related to the claimant's gender. The claimant gave us very little evidence of the effect upon her of the alleged acts of harassment she relied upon. Based on our findings above, we find that none of the matters relied upon had the purpose of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. The respondent was engaging in routine managerial processes. Therefore if the conduct relied upon had that effect upon the claimant, we find that it was not reasonable for that conduct to have that effect.
264. The respondent regards the claimant as a good performer and her work is valued. The claimant has a higher perception of her performance as demonstrated by her evidence that she considered that she should be paid more than her line manager and the manager above him. We did not agree with this perception.
265. We noted the respondent's stated aim of improving equality and diversity and inclusion and their aim of seeking to promote more women into senior roles. We make the observation that PDP's are a useful starting point and that mentoring and coaching is an important part of following through with these aims; as is tailored equality and diversity training for senior managers, going beyond on-line webinars.
266. We also find that Mr Waters is not a "liar" as he was described in the claimant's evidence, for example at paragraph 243 of her statement. He was not averse to putting her forward for promotion because of her gender. He did so in 2016.
267. On the time point, the respondent submitted that allegations (ii), (iii) and (iv) were one off decisions in relation to which time did not fall to be

extended. No positive case was put by the claimant on the just and equitable provision. The submissions were put on the basis of there being a continuing act with reliance on ***Hendricks***. As the allegations in question failed, it was not necessary for us to decide the time point.

268. For these reasons the claims fail and are dismissed. The provisional remedy hearing date is vacated.

Employment Judge Elliott
Date: 1 February 2019

Judgment sent to the parties and entered in the Register on: 4 February 2019
_____ for Tribunals

**APPENDIX
CAST LIST AND ACRONYMS**

Ball, Donna dos Santos, Christopher Marsden, David DM	Claimant, Associate Director in PFP Managing Director, Commercial Banking Claimant's Line Manager 1 February 2018 onwards Claimant's comparator. Promoted from AD to Director in 2017
Neville, Mark	Senior Business Partner (Executive Director) heard Grievance Appeal
Owen, Brian Pickstock, Helen	Business Partner (Director) the Grievance officer interviewed the claimant for Director role on Real Estate team
PQ TS Waters, David	The claimant's comparator, Associate Director in PFP Associate Director in PFP, left the respondent in 2016 Executive Director and claimant's line manager January 2003 to January 2018.
AW Williams, Dylan Williams, Mark	The claimant's comparator, Associate Director in PFP Line manager of Mr dos Santos Risk Manager

Acronyms

CRE	Commercial Real Estate
CB	Commercial Banking
HHI	Hotels, Healthcare and Insurance
NBR	New Business Relationship
NNL	Net New Lending
PFP	Professional Services, Financial Services, and Private Commercial Banking (the claimant's team)
RM	Relationship Manager (i.e. banker)