EMPLOYMENT TRIBUNALS

Claimant: **Ms Elisabeth Maugars**

Respondent: **DB Group Services (UK) Limited**

Heard at: **East London Hearing Centre**

On: **11, 12, 13, 14 October 2022 and 9 November 2022**
Reserved Decision (in chambers) 10 and 11 November 2022

Before: **Employment Judge B Elgot**
Members: **Ms G Forrest**
Mr S Woodhouse

Representation:
For the Claimant: **Mr S Devonshire, KC and Mr M Lee, Counsel**
For the Respondent: **Mr E Williams KC, Counsel**

The Tribunal having reserved its decision now gives judgment as follows:-

JUDGMENT

1. **The claim of unfair dismissal does not succeed and is DISMISSED**

2. **The claims of age discrimination and sex discrimination do not succeed and are DISMISSED.**

REASONS

1. The Claimant lodged her claim on 23 December 2020 and sets out her detailed grounds of complaint at pages 34-45 of the agreed bundle of documents. She claims that she was unfairly dismissed purportedly by reason of redundancy from her job as a Managing Director of Non- Recourse Lending (NRL) within the Global Lending Division of the Respondent based in London where there were at the relevant time approximately 190 employees.

2. The Claimant also sat on the Executive Committee (Exco) of Global Lending (GL) and we are certain that this role involved her in regular reviews of costs, revenues and structures in GL. Two of the other members of the GL Exco Messrs Cassavant and Clarke were in their mid-fifties as was the Claimant.

3. Global Lending sits within the Wealth Management (WM) division of the Bank. Her notice period was extended on more than one occasion for the purpose of finding her an alternative job but the Claimant eventually left the Respondent's employment on 2 October 2020. It is the Claimant's case that a significant and material factor in the decision to dismiss her was that she is an older woman and that her dismissal was influenced by her sex and/or age and was therefore an act of sex and/or age discrimination. In addition she claims that her dismissal was unfair both substantively and procedurally as appears from paragraph 4.1.1 – 4.1.4 of the List of Issues (pages 102-103)

4. The Claimant makes complaints of direct discrimination under section 13 Equality Act 2010 (the 2010 Act) which describes the statutory tort where '*A [the Claimant] receives less favourable treatment than others because of a protected characteristic'.* The Claimant relies on the two protected characteristics of sex (she is a woman) and of age. She places herself in the age group 55-60 and was aged 57 when she was dismissed.

5. The Claimant frequently refers to herself in these proceedings as an 'older woman' and indeed emphasises that she is an older woman who declines to dye her grey hair. However we are conscious, as the parties agree, that the provisions in the 2010 Act for dual or combined protected characteristics are not in force and we are obliged to consider the two separate types of alleged discrimination i.e. was the Claimant treated less favourably than others because of her sex or because of her age or because of both. The question is not whether she was so treated because she was an 'older woman' as a combined characteristic. We are conscious of course that the Claimant only has to show that one or both of her protected characteristics significantly caused the alleged treatment and neither need be the only cause.

6. The Claimant was recruited to her position at the Respondent which is the employing entity for Deutsche Bank AG (the Bank) on 28 September 2015 when she was aged 52 and this fact has had some influence in persuading us against her arguments of a prevailing historical culture of prejudice against older employees which she has sought to demonstrate and about which we set out our further findings below. As we have said above, two of her fellow members of the GL Exco were of a similar age

7. <u>Claims, Comparators and List of Issues</u>.

   7.1 The claims are of unfair dismissal and of direct age and sex discrimination. Claims of direct discrimination consist of allegations that the Claimant has been subjected by the Respondent to '*less favourable treatment'* than others because of one or both of her protected characteristics. Such discrimination claims necessarily require a comparison of the treatment of the Claimant with the treatment of others, known as comparators and the 2010 Act sets out the requisite profile of any actual or hypothetical comparator whose circumstances must be the same in all material respects as the employee, save for the protected characteristics. A comparator whose circumstances are not the same in all respects may still be considered evidentially i.e. as evidence of how the Respondent may treat a hypothetical comparator.

7.2 We find that most of the actual comparators named by the Claimant at paragraphs 1.3 and 2.3 of the List of Issues on pages 85-86 of the bundle do not meet that profile or assist us evidentially in deciding these claims. For example the comparison with the potential treatment of the Claimant's junior employees Vanshree Verma and Gerhard van Dem Hagen is inappropriate because they were considerably junior to her, had much less expertise, qualification and experience and lower earnings and status; their material circumstances at the relevant time were not the same. Ms Alashkar and Ms Kitidis were not involved in any of the circumstances or events said to amount to discriminatory treatment under paragraph 2.2. The only relevance of their comparative treatment is in relation to earlier matters, preceding the Claimant's being placed at risk of redundancy, which the Claimant says amount to proof of a '*culture of sexism and ageism*' at the Bank.

7.3 Accordingly we have focused on a hypothetical comparator who is of the same or similar seniority and status, knowledge and expertise, impressive career and earning power as the Claimant yet is a man and/or is of a different age group to her. That comparator hypothetically has the same or similar cv and role, business costs and revenues in June 2020 and is working in the same financial, economic and social climate as then pertained, particularly the imperative to reduce costs across the Bank, and working during the covid 19 pandemic resulting in the 23 March 2020 UK lockdown. This is the hypothetical comparator we have looked at.

7.4 Mr Matharu's background, role and position has also been considered carefully because he is the one actual comparator named by the Claimant whose treatment in the January 2020 round of redundancies is evidentially relevant not least because of the question as to whether he should have been placed in a pool with the Claimant. Our findings of fact in this respect are set out fully below.

7.5 At a Preliminary Hearing on 9 July 2021 before Employment Judge Gardiner the parties finalised and agreed a straightforward List of Issues which is at page 85 of the bundle. It is clear from that List that the allegations of less favourable treatment all relate to the Claimant's being placed at risk of redundancy, her selection for redundancy, the Respondent's failure to redeploy her across the Bank's business globally and her ultimate dismissal.

7.6 She has prepared a Schedule of Loss including pension loss at pages 405-409 of the bundle which claims an amount in excess of £4.6 million calculated gross. This is therefore a very high value claim.

8. <u>Documents and Witnesses.</u>

8.1 The Claimant gave evidence on her own behalf. The Respondent's witnesses were Mr Arjun Nagarkatti who took the decision to dismiss her and was at the relevant time the Bank's Head of Global Lending within its Wealth Management Division (WM) and Ms Sharon Wilson who was then a Human Resources Partner and advised Mr Nagarkatti throughout the redundancy selection, consultation and dismissal process. She also oversaw the redeployment efforts primarily undertaken by her colleague Ms Kim Irving of the Internal Mobility/Redeployment Team who did not give evidence. The Claimant's appeal against dismissal was heard by Mr Andrew Zielenski who was

the joint decision maker (with Ms Nisha Dave, HR) in refusing to allow her appeal and upholding her redundancy dismissal. Mr Zielenski gave evidence and we received a written witness statement from Ms Sravya Arekatla an HR Adviser who investigated certain matters raised in the appeal but did not give oral evidence and was not cross examined. The parties understood and accepted that we could give less weight to her testimony than to the oral evidence given by witnesses in person who were exposed to the challenge of cross examination.

8.2 There is an agreed bundle of over 2100 pages several 100s pages of which refer to the efforts made by the Respondent and by the Claimant personally to find her another job within the Respondent's worldwide organisation. In accordance with the usual practice of the Tribunal we read only those documents in the bundle to which our attention was directed by counsel, the parties and the witnesses. Counsel supplied us with a jointly prepared suggested reading list.

We were assisted by comprehensive written and verbal closing submissions from both leading counsel together with a bundle of legal authorities from both. Mr Devonshire also prepared an opening note.

8.3 The parties jointly commissioned a word for word transcript of the hearing (not including submissions) at the request of the Claimant. That transcript was made available to the Tribunal and we also took our own notes. Some recording of the proceedings was necessary to check the accuracy of the transcript but the recordings were thereafter deleted.

8.4 Mr Devonshire KC said in his verbal closing submissions on behalf of the Claimant that she does not allege that any of the Respondent's witnesses or indeed its employees are individual discriminators save for Mr Nagarkatti (AN). She does not sue AN in his individual capacity but she holds him responsible for the actions which she alleges amount to discriminatory conduct by the Respondent. This means that Ms Wilson (SW) and Mr Zielenski (AZ) are, contrary to some previous indications, not said to have acted in a discriminatory way. This has led us to conclude that perhaps the Claimant no longer alleges that the failure to re-deploy her over the period 10 June to 2 October 2020 was as a result of age and/or sex discrimination because the two HR professionals responsible for the redeployment process, namely Ms Wilson and Ms Irving, are excluded from the description of discriminators. It leads to the conclusion that the Claimant does not allege that her unsuccessful appeal against redundancy dismissal was tainted by age and/or sex discrimination because Mr Zielenski, Ms Dave and Ms Arketla are not identified as discriminators.

Nonetheless we have made findings below which conclude, by reference to all the evidence, that the Respondent's efforts to identify opportunities for re-deployment were both fair and reasonable and did not amount to direct sex or age discrimination.

9. <u>The Claimant's Career and Role</u>

9.1 It is beyond doubt that the Claimant had a very successful career in banking and financial services across a period of 35 years and has a vocational commitment to her work which she considerably enjoyed and prioritised. Her cv is at page 179 and speaks for itself. She said that she *'loved'* her career at the Bank and was '*super*

happy' there. She has received praise and admiration, promotion and reward for her achievements. She was highly paid, earning through salary and variable compensation/bonus payments together with cash payment in lieu of pension contribution a substantial annual remuneration; her basic gross salary alone was £295,000 annually. There has been no doubt cast by any of the Respondent's witnesses or amongst the Bank's documents about her performance and expertise in any aspect of that career.

9.2 In her latter role with the Respondent she specialised in non-recourse lending (NRL) and was Managing Director (MD) of the NRL Group. NRL was described to us as a form of lending, mostly to very high net worth individuals (HNWI) or wealthy families, secured on assets themselves where no personal recourse or guarantee is required. The role of the Claimant and her small team which was three and then later two junior colleagues (Vanshree Verma and Gerhard von dem Hagen) was to either originate these loans themselves or via Bank relationship managers, assess and filter the NRL business and pass ultimate 'ownership' of the loan either to the Corporate or Investment Bank part of the Respondent for which a percentage of the revenue is paid as a fee to NRL.
In other words NRL as part of Global Lending under the WM Division does not assume the risk of the non-recourse loan although may occasionally have to re-structure it.
AN describes in paragraph 8 of his witness statement how this NRL business is done.

'*In Non-Recourse Lending it was crucial to know where and when to connect and whether the transaction was feasible and would fit within DB's appetite. Unlike the Recourse Lending business Non-Recourse Lending did not involve underwriting the loan or managing the ongoing relationship e.g. ensuring the deal was not going bad. As it involved referral with the loan sitting in the Investment Banking or Corporate Banking business there was no real responsibility once the deal had been done'.*

The NRL revenue comes primarily from the fees. As in any kind of financial services there is close attention focussed on the figures relating not only to current income but also to 'pipeline' business and the revenues which are forecast to be produced in the future.

9.3 The Claimant was closely involved in substantial NRL deals named Armadillo and Sunset and in particular was awarded by Mr de Sanctis the 'deal of the year' in March 2019.

She was invited by the now retired Chief Executive Michael Morley to join the board of Deutsche Bank UK as a non-executive director. AN agreed under cross examination that this signalled the Claimant's impressive record and reputation. She was not treated by the Respondent and particularly during the redeployment process following her redundancy as being only in the 'NRL silo'. Unfortunately her appointment to this role was not confirmed in all the circumstances of her redundancy and for the appropriate reasons set out in SW's witness statement at paragraphs 71 -72 in which she recounts her discussions with Mr Morley.

10. The structure of Global Lending and Mr Nagarkati's role in 2020; the decision to merge RL and NRL.

10.1 The structure charts on pages 229 and 231 of the bundle show the organisation of Global Lending prior to the Claimant's redundancy with her as a Managing Director of the NRL team and her two direct reports under the management of the Global Head of Lending which was Mr Nagarkatti's role after 1 January 2020 when he succeeded Mr B. Prasanna. AN reported at the time to Mr Claudio de Sanctis then Global Head of Wealth Management.

10.2 AN also had responsibility, prior to 1 June 2020 when consultation on the Claimant's redundancy began, for four regional heads all of whom were MDs except for Ms June Wong. The structure chart shows Mitch Matharu as MD in charge of Strategic Lending &UK, Ms Wong as Director for Lending in Emerging Markets, Mr Claude Casavant as MD Head of Lending Europe and Mr Tom Clarke MD as Head of Lending Americas. Each of those four senior employees had larger teams than the Claimant. AN also managed a Chief Operating Officer for Lending Management (COO) Mr Abid Nazir. AN describes his own role and the specific structure in his witness statement at paragraph 5

10.3 We make a finding of fact that, despite her claim to do so, the Claimant did not directly manage the NRL Director in the Americas region who is named Sophie Peresson. There was dotted line responsibility from Ms Peresson to the Claimant which means that there was an exchange of data and learning between the two but the Claimant was not the direct line manager with responsibility for Ms Peresson's duties, performance and revenues. AN credibly told us at paragraph 40 of his witness statement that the dotted line representing exchange of information allowed him to have *'visibility across the board in one place as I could attend one meeting with the Claimant'* but she was not responsible for NRL in the US. Therefore having seen figures produced by the Claimant at pages 1353-1354 claiming responsibility for supervising 29 million euros revenues generated by the Americas region Mr Nagarkatti told us that he did not accept those numbers and we are convinced that these were not revenues directly produced by the Claimant.

We find that in March 2020 Mr Tom Clarke was in charge of all RL and NRL in the Americas region.

10.4 Prior to I January 2020 AN was the Chief Risk Officer for Wealth Management from 2017 to the end of 2019. He has explained that in that role he knew Mr Matharu and the global Recourse Lending business well (including the UK). This is because, as further explained below and in contrast to NRL, WM takes the risk for that type of business and it was AN's role to oversee management of risk. He was also familiar with NRL generally but did not know the Claimant and her specific business in any detail.

10.5 The core decision made in March 2020 by AN and thereafter reconsidered and refined by him in April/May 2020 was to merge NRL and the Strategic Lending & UK (RL) teams. AN's intention was to merge those teams under Mr Mitch Matharu. This is on its face a straightforward redundancy situation. By reference to section 139 Employment Rights Act 1996 it is the Respondent's case that the Claimant's dismissal was '*wholly or mainly attributable to… the fact that the requirements of the*

business for employees to carry out work of a particular kind…have ceased or diminished or are expected to cease or diminish'.
In other words with the merger of RL and NRL there would be less requirement for two MDs to manage this part of the Global Lending business because only one MD would be required to take responsibility for the merged structure. One less MD was needed in accordance with AN's plan and the Claimant was placed in a 'pool of one' because her role would be '*eliminated*'. HR advice confirmed the sense of this decision once it had been explained to Ms Wilson by AN.

10.6 SW's evidence at paragraph 18 of her witness statement is clear that,

'*I wanted to ensure that I understood and was also comfortable with the rationale for the redundancies. We also discussed whether a selection pool or scoring would be required. I was comfortable with the rationale provided i.e. it was an elimination of a role…I am aware that the Claimant has alleged…that Mr Nagarkatti simply decided that the Claimant should be dismissed and there was no discussion of a reasonable form of selection process. I do not agree with this allegation. Mr Nagarkatti had a clear rationale which he had discussed with other senior individuals who had experience and understanding of the business…I was therefore satisfied that it was appropriate that the Claimant was in a pool of one'* [our emphasis].

It was Ms Wilson who asked AN to complete the redundancy rationale document dated 18 May 2020 which is seen at pages 223-227 of the bundle.

11. The Claimant's case

11.1 It is the Claimant's contention that her dismissal was for reasons other than a sound business decision about genuine redundancy and was unfair by reference to the statutory fairness test in section 98(4) Employment Rights Act 1996 (the 1996 Act). She contends that the decision to put her at risk, her selection for redundancy, the process of warning and consultation and the decision to dismiss her following a period of unsuccessful attempts at re-deployment was a series of actions materially and significantly influenced by age and/or sex discrimination.

Redundancy is one of the potentially fair reasons for dismissal in section 98(2) of the 1996 Act. The Respondent pleads in the alternative that its decision to restructure the GL business was 'some other substantial reason' justifying the Claimant's dismissal and that a fair process was followed.

We are satisfied for the reasons given below that the reason for dismissal was redundancy.

11.2 Section 98(4) of the 1996 Act states '*the determination of the question whether the dismissal is fair or unfair having regard to the reason shown by the employer depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking* [the Bank is a large and well-resourced global business] *the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

Shall be determined in accordance with equity and the substantial merits of the case'

11.3 First, the Claimant alleges that what she calls the 'purported' financial and organisational rationale for her proposed dismissal through redundancy lacked all real cogency and was fundamentally flawed. She admits no sound reasoning for the erasure of the NRL team and its merger with RL in the Strategic Lending and UK team. She wanted to keep her own discrete role and her team. She strongly disagrees with the decision of AN that considerably smaller revenue made by NRL meant that it was unnecessary and over-costly to have an MD in charge of that discrete team particularly given the forecast of serious disruption to the Bank's lending business and the loss of income likely to be caused by the pandemic. She disagrees with AN's preference for RL and NRL in the UK to follow the same structure as in Americas as appears from page 232 and states that she was not properly consulted on this aspect. The Claimant's position is summarised at paragraph 26 of her counsels' Opening Note.

11.4 In most unfair dismissal cases the Tribunal does not re-examine or analyse the business reasons for a redundancy situation such as the one described by the Respondent but simply looks at whether the dismissal(s) of employees in that situation was fair in accordance with the section 98(4) test and by reference to the particular requirements in redundancy dismissals to warn and to consult , properly and genuinely, both collectively and individually, to consider the proper composition of the pool, to select staff for redundancy fairly using proper and impartial criteria and to take steps to ameliorate the effects of redundancy particularly by looking for re-deployment opportunities as widely and conscientiously as possible.

11.5 However the Claimant's argument is that the business decisions made by the Respondent which resulted in her selection for redundancy and ultimate dismissal were so perverse and irrational, even heinous, that there must be 'something more'. Thus she asks us to conclude that the reason for the less favourable treatment consisting of her redundancy dismissal was not the need for less employees and the disbandment of her team but was discrimination on the ground of one or both of the selected protected characteristics. She invites us to conclude that a hypothetical comparator as identified above would not have received the same treatment. The List of Issues reflects this position.

11.6 We have found for the reasons given below that the Claimant was made the subject of a redundancy process and was dismissed as redundant because the Respondent had sound and rational business reasons for this decision which were non-discriminatory.

11.7 Paragraphs 5-6.4 and 110-143 of the Claimant's counsels' closing submission remind us in detailed terms and language of the legal framework pertinent to these claims and the task of the Tribunal in these proceedings and particularly emphasises the necessity to make thorough findings of the primary facts and apply the onus and burden of proof provisions set out in section 136 of the 2010 Act as elucidated by case law. Counsel for the Respondent does not disagree with those legal statements and for example reiterates the 'two stage burden of proof' at paragraphs 85-89 of his closing argument. We hereby record that we are conscious of the task in both discrimination and unfair dismissal cases and there is no necessity for us to repeat its obligations in these Reasons. We accept and adopt the analysis of all three counsel in this case and thank them for setting out a thorough summary.

11.8 A dismissal which is found to be discriminatory will almost inevitably be unfair. We have therefore looked first at the claims of age and sex discrimination and then made such further findings and conclusions about the fairness of the dismissal as are necessary :-

12. 2019 Redundancies

12.1 The Claimant was apparently genuinely shocked to be placed at risk of redundancy on 1 June 2020 when she received the letter at page 287 of the bundle following a short meeting with AN and SW at which it was explained that her role may no longer be required by the Bank because '*as part of an ongoing review, restructuring and consolidation of Deutsche Bank's Wealth Management Division your department has identified that your role is one of those that may no longer be required*'.

We find that this letter, otherwise expressed in 'standard' terms as drafted by HR, gives the Clamant the reason why she is being placed at risk and warns her that she may be dismissed with effect from 30 June 2020. The correspondence emphasises that dismissal may eventually result but that no final decision has been made and first there will be a period of consultation. The arrangements for consultation are spelled out and the Claimant was immediately referred (in accordance with usual practice as SW explained) to the facilities for searching for alternative employment including a Redeployment Coordinator service. She was placed on leave and her access to the Bank's IT systems was cancelled as is, again, the invariable practice in this industry.

12.2 She cannot however realistically have seen this situation as arising entirely out of the blue. The Respondent made redundancies described in a detailed breakdown in paragraphs 6-9 of SW's witness statement- in September 2019 this consisted of placing 20 employees at risk, November 2019 with 33 at risk and December 2019 with 15 employees facing potential redundancy. AN is clear that these steps were taken to reduce the cost base of WM globally. SW refers generally to '*costs targets, the impact of the covid 19 pandemic on work and the need to ensure business efficiency'.* The 2019 redundancies (of course pre-pandemic) were presented for collective consultation with the Respondent's Employee Consultation Forum (ECF) as were the 2020 redundancies. This consultation in 2020 can be seen at pages 167-168 of the bundle where there is reference to '*up to a maximum of 15 roles'* and in the section headed 'Background' there is a summary of the need for potential redundancies which mirrors the explanations given by the Respondent's witnesses AN and SW.

12.3 It is unfortunate and tactless that the Claimant was asked by Mr de Sanctis and agreed on 26 May 2020 to forego a month's salary to aid the Bank's finances; re-payment has been refused. By that time AN had decided to place her at risk and given the instruction to HR to take this step. It is another part of the Respondent which is responsible for this salary forbearance initiative and AN was not involved. The circumstances where all very senior managers named as 'responsible leaders' of whatever sex or age were asked to set this example of cost cutting does not amount to discriminatory behaviour; we are satisfied that a comparator would have received the same request and been free to agree or decline. Mr Williams KC makes the point on behalf of the Bank that the inclusion of the Claimant in this group

indicates that her redundancy was not an inevitable 'done deal' prior to consultation and therefore she was included in the high level request to give up salary.

12.4 Mr Nagarkatti although not yet in post as Head of Global Lending had some involvement in the December 2019 redundancies because he was consulted by relevant senior colleagues including the driving force Mr de Sanctis. AN also talked to Messrs Balaji Prasanna (his predecessor) and Alessandro Caironi (then Global Head of Advisory and Sales within the International Private Banking (IPB) division) . AN is clear of his understanding even in December 2019 and before he had ever met the Claimant that, although he needed more time to work out the volumes and pipeline of NRL, '*my initial sense was that having an MD as head of Non-Recourse Lending was outside the existing structure but I would get a sense of how this was going to work in practice'* (paragraph 10). SW says that AN was also persuaded by Mr Caironi not to put the Claimant immediately at risk within this earlier process.

12.5 The Claimant has made something of the fact that this group of consultees and other similar email communication streams were a 'clique' of men younger than her. Specifically she points to the use of the generic description '*Guys'* which is the opening greeting on an email dated 4 February 2020 at page 2006 sent to MM and Mr Cassavant and copied to AN. First, we note that this is an email from, and an expression used, not by AN but by Mr Nazir. Secondly, we cannot agree by reference to our industrial relations and indeed general social knowledge that this greeting or appellation is anything except a widely used colloquial word in slang usage by both sexes to denote a group of colleagues or friends. We attach no significance to this usage by Mr Nazir and are satisfied that it is not, as the Claimant suspects, indicative of an exclusive 'boys club' collaborating with each other to their own ends. It's usage has no significance in this case.

12.6 AN told us that even at that early stage he considered the merger of RL and NRL because '*why was there a separate MD in charge of such small revenues?*'. Those smaller revenues could be retained within a merged team. However he took the view that he did not know enough about the specific NRL business managed by the Claimant. He was very familiar with the lending done by MM and his team which he describes in paragraph 22 of his witness statement. He took the decision as Mr Caironi suggested to leave the Claimant where she was and thought that when he took up his post in January 2020 he would observe and analyse the costs, revenue and pipeline of NRL and look again at the structure of the five heads of business which he had inherited.

12.7 The December 2019 redundancies affected staff across all genders and age groups and demonstrates no corporate aim which seeks to achieve the removal of women and/or those in the age group 55-60. SW has supplied the statistical information in paragraphs 6-8 of her statement including information about job title/seniority, gender and age. That information demonstrates no obvious gender or age bias. She sent some contemporaneous information to the Claimant on 23 June 2020 as can be seen at the foot of page 471 including the percentage of women (46%) who were placed at risk in September and November 2019 and obtained re-deployment (54%). One of the Claimant's pleaded comparators and her previous line manager, Caroline Kitsidis (aged in her forties), was made redundant at the end of 2019.

12.8 An employer and any individual manager which sought to remove 'older women' from the organisation might have exploited this opportunity to include the Claimant in this earlier round of redundancies but instead AN consciously excluded the Claimant and made up his mind to initially understand and monitor her area of the business.

13. The rationale for AN decision to place the Claimant at risk. January-June 2020

13.1 As we have stated above, when AN arrived to take up his new role on1 January 2020 he had detailed familiarity with RL and with the business undertaken by Mr Matharu (MM) and his team in Strategic Lending and UK. AN emphasises the complexity and risk of many of the RL transactions. AN also understood the 'nuts and bolts' of NRL as he describes in paragraph 8 of his statement. He told us '*I understood the non-recourse lending business inside out globally for 14 years'.* He did not know the Claimant or the specific transactions she originated, processed and had in pipeline. He was unsurprisingly tasked with saving money and improving revenues as is invariably the case with senior managers in a competitive commercial environment. In addition there was an urgent cost pressure in WM driven by Mr de Sanctis. We conclude that the Claimant's eventual redundancy dismissal was of a piece with these earlier redundancies and carried out for the same reasons and most importantly to save costs.

13.2 MM and the Claimant were both MDs. The cost to the Bank of MM's salary and incentive package was higher. For him to have been dismissed would have saved more money. Before we make further findings about the respective revenues of RL and NRL we confirm that we are satisfied that the cost associated with both RL and NRL were highly relevant to AN's considerations as to what steps needed to be taken in regard to Global Lending within WM. Across the WM business there was at the time an 'unacceptable' cost/return ratio of up to 94%; this means reduced profit. Mr de Sanctis required a future cost-income ratio nearer to 70% within a 3 year timeframe. The Employee Consultation Forum document at pages 167-168 refers to *unsustainable* cost/income ratio in WM; the aim to reduce this ratio was clear and must have been obvious to the Claimant as a member of the Exco.

13.3 Incidentally, we note that in early 2021 as described in paragraph 82 of SW's witness statement there was still an unsustainable cost-income ratio of around 90% and a further 10 roles were identified as at risk of redundancy including Mr Matharu himself who was dismissed by reason of redundancy in August 2021. A further 9 roles were placed at risk in September and November 2021 in International Private Banking (IPB)

13.4 In January/February 2020 AN carried out, in conjunction and consultation with his COO Mr Nazir, a review of the NRL revenues including existing and pipeline/carry on deals. The spreadsheets (client information redacted) appear at pages 2006-2009 of the bundle. Some of the figures are supplied by Ms Verma and said to be '*checked by...Elisabeth'.* Mr Nasir writes that his revenue spreadsheets are also reviewed by the Claimant ('Elisabeth') among others. The Claimant knew and approved the revenue numbers. Her revenue and turnover is much the smallest. AN does not incidentally agree, as he told us in his oral evidence, that NRL always and invariably attracts a straight 50% fee on all transactions. In this respect he differs from the Claimant.

13.5 It is an important aspect of the Claimant's case that AN analysed the specific cost of NRL completely wrongly and that his decision that her cost as an MD could not be justified by reference to her NRL revenues (including the cost of her two reports) was so unaccountable as to demonstrate both unfairness and to discharge her initial burden of proof that this was something from which we could and should infer or conclude unlawful discrimination.

She sought to persuade us that if the NRL team was taken singly a different costs analysis would demonstrate that her NRL business's cost/revenue ratio was as low as 12%.

There are for example several pages of Claimant's counsels' closing summary and submission beginning at paragraph 71 referencing the Claimant's witness statement at paragraphs 5.4 -5.7 which address this argument and reiterate the Claimant's retrospective contention and calculations about her costs, profitability and future prospects. For example she says that her business's limited costs on her own calculation increased her profit margin despite the generation of smaller revenue. These are matters which she did not in fact argue in the 10 June 2020 redundancy consultation meeting.

13.6 Counsels' closing submissions go on at paragraphs 73 -78 to suggest matters which AN ought to have assessed and in-putted into his 'purported' rationale for the Claimant's redundancy including, for example, a detailed assessment of the profitability of the other separate and component parts of GL as compared to NRL and the future profitability of the 'various business lines' in GL by reference to pipeline transactions since the beginning of 2020. The argument on behalf of the Claimant is that the 'failure' which she now seeks to demonstrate indicates a level of superficiality and such a lack of meaningful evaluation that we can safely conclude that AN had pre-determined her dismissal for discriminatory reasons and then sought to give an ex post facto justification for it. We do not agree with this argument.

13.7 We find it incontrovertible that the Respondent was obliged as part of its ongoing commercial review to examine and balance both the costs of the business or any part of it and the relevant revenue so as to ascertain profit or likely return. The redundancy consultation with the Claimant around AN's decision to place her at risk was not just about costs or just about revenues or involving a minute analysis of the profitability of each team. It was much simpler as AN explained in his oral evidence to us and in essence it was because the revenue of the Claimant's team was too small to justify the salary and benefits cost of an MD when that cost could be saved by merging RL and NRL (as was the case in the Americas and Germany).

The use of a more simplistic (AN would say obvious) analysis of costs against revenue i.e. saving money on the salary of very senior employees whose work could be done by others and following the level of consideration which AN gave to it (including utilising the expertise of others) does not amount to evidence from which we conclude that there was a predetermined aim to dismiss the Claimant as a woman and/or as a person within the 55-60 age group.

14. Consultation Meeting 10 June 2020

14.1 AN conducted the first and only consultation meeting which occurred between him and the Claimant and at which SW attended to give advice and information on 10 June 2020. The Claimant was not represented or accompanied but she had the opportunity to be so. The meeting lasted one hour and 14 minutes and was transcribed by an external service. The transcription is at pages 371-388 of the bundle. It was explained to the Claimant that she was undergoing an 'at risk' consultation and her redundancy was not yet confirmed. AN also emphasised his rationale (373H)

'*every division has to constantly look at the business model, constantly look at what costs we incur and constantly review what structures we've got. It's just our responsibility in terms of how we run the division and how we run the business, how we run wealth, how we run lending''.*

He made it clear that the Claimant was not singled out and that the review was constant and ongoing (see 374 D&E). She was told that there were 15 potential redundancies in WM in the UK as discussed with the ECF in March 2020.

AN strongly disagreed '*for the record'* at page 375H with the Claimant's assertion of implied favouritism and/or bias and that this meeting was about '*who he wanted to have less in his team'.* He stated in response to her allegation that she was most definitely not singled out by reason of her age and/or sex.

We reiterate that the Claimant had seen and approved the revenue spreadsheets produced by Mr Nasir at pages 2006-9.

14.2 AN however told the Claimant at page 378D that they must *'agree to disagree'* about her assertion that the decision to place her at risk was only about comparative revenues in different parts of the GL business and not driven by any reasonable costs analysis. He informed her that he could not look at the revenue numbers and the costs numbers in isolation '*every business has to have an appropriate amount of cost driven by also what the revenues are'*.

Thus he rejected the Claimant's arguments that she had much lower costs and could look to reduce them and whilst he acknowledged that her revenues might have potential to grow it was not enough. He said '*even if it goes up to seven* [million euros]*, it goes up to eight, its still the same, it's a really small number to what would, for me in what would not be an MD role'.*

He reiterated at page 377E '*in very simple terms'* 'that a Director in the US made '*29 million that was made last year. In emerging markets we have 20 million ...yes that's under an MD... directly under your purview we have 6 million'.*

This is the statement of the essentially simple rationale given at the time and which we are satisfied was not so 'meaningless' as to demonstrate a failure of engagement from which we should infer discrimination.

AN's evidence to us was that he took the decision to look at costs overall across the five heads of Global Lending in a consistent fashion including for example the inclusion of overheads/office/legal/treasury cost associated with each part of the business. The Claimant now says that this is an incorrect calculation vis a vis NRL

because such costs were mainly borne by Investment Banking in the NRL transactions. AN did disagree and still disagrees with her counter-calculation and did not falter when cross examined about this matter.

14.3 We are satisfied that we need not resolve such a dispute. AN took a reasonable view untainted by discrimination in applying a cost analysis which he formulated and documented in conjunction with his COO and to which he applied his own senior managerial experience and expertise. He listened to and took account of the Claimant's points. We observe that if we were ourselves to undertake a separate calculation of the costs associated with NRL it might arguably be necessary for us to look across all five heads of GL, calculate the most expensive team with the worst cost/revenue ratio using different calculations of overheads etc. and substitute our own argument that AN should have selected a different MD for redundancy or none at all. We decline to undertake that exercise in the absence of evidence of discrimination against the Claimant because of her two protected characteristics.

14.4 The Claimant suggests that AN could have talked to her in general terms before she was placed at risk, for example how she herself might propose to reduce the costs in NRL and GL across the board. (In fact her own calculation that costs/revenue in NRL was already at a very low percentage may well have been her response). In this respect the consultation may have been more meaningful if the Claimant had been engaged but that does not make it unfair or discriminatory. We make findings below about our decision that the consultation was nonetheless reasonable and fair and why we have determined that AN obtained sufficient data and opinion to inform his decision to place the Claimant at risk.

14.5 We remind ourselves that AN was primarily looking at whether NRL revenue could sustain the cost of a discrete MD. The Claimant was definitely given the opportunity to respond to this issue during the formal consultation.

14.6 The Claimant was invited to continue the consultation by way of a further formal meeting, by submitting all and any further questions she may have and by way of conversation by email or calls with AN or SW. This was emphasised by SW at page 387C and again at 388B and 388D '*the consultation does not have to only be this meeting'.* There are relevant emails at pages 1242 and 1244 enquiring whether the Claimant has further questions. The Claimant already knew on 10 June 2020 that redeployment efforts had begun on her behalf although there were no immediate open vacancies in Wealth Management. She did not take advantage of any such opportunity for further redundancy consultation but did undertake her own considerable efforts to find a new role within the Bank.

14.7 We make the brief finding that pages 190 -191 in the bundle do not indicate a pre-determination to dismiss the Claimant as early as 13 May 2020. Those documents are only evidence of SW seeking to get ahead with the preparation of paperwork for at least 8 potential redundancies and asking the 'off boarding' team to prepare draft documentation at an early stage because of high demand for their services.

15. The GL Structure of RL and NRL in other areas e.g. Americas

15.1 This is a matter which was discussed in the consultation meeting specifically at page 383 F when AN says '*What I will likely do or what we will think to do over the coming-in the next three or four weeks- is bring the structure in the UK in line with what we've got in the US as well, right, where we will bring this under Mitch we will kind of cover both the recourse and the non-recourse part under him'*.

We accept that AN logically considered as he states in paragraph 20 of his witness statement, that a 'cleaner' structure needed to pertain whereby, as in the Americas and Germany both RL and NRL had one joint regional head at MD level reporting to him rather than have both MM and the Claimant as separate MDs (with the salary costs) in charge of the two teams.

There is no evidence that this decision was an irrational or perverse approach amounting to unfairness or prejudice against an older woman in the NRL MD role. We are satisfied that this was a cogent and pertinent reason for AN's consideration of the Claimant's redundancy.

15.2 The Claimant was had an opportunity to respond on the issue of structural alignment. She was able to make the point at page 383H that she did not believe that this alignment had worked in the Americas '*the business line and the revenues from Sophie are down by 35,40%. So how do you consider that as a success?'.* Again, AN told her they must 'agree to disagree' about what he described as her '*extremely incorrect conclusion'.* We cannot agree with Claimant's counsel that the Claimant was unaware or mis-informed in any way about this element of AN's decision making.

16. The Covid 19 Pandemic

There are two relevant sets of findings in relation to the pandemic which began to emerge globally in February 2020 and which resulted in total lockdown of the UK economy and society on 23 March 2020.

16.1 First, the initial decision of AN in March 2020 that the Claimant should be placed at risk of redundancy for the reasons described above was stalled. This is because the Respondent imposed not only a' freeze' on making new redundancies but also upon communication about such potential or actual dismissals. The relevant document is at page 2010 dated 26 March 2020 authored at high level, addressed to 'all staff' and states,

'*our transformation is making progress and we are very focussed on retaining the momentum we built in 2019. To avoid additional emotional distress in the current environment we will defer new communications of individual restructuring actions to potentially affected employees. The pause will be in place until we see a return to greater stability in the world around us… we will continue ongoing or planned negotiations with the relevant Employee Representative groups'.*
This meant that AN was forbidden and could not commence individual consultation with the Claimant about her potential redundancy and she could not

be placed at risk in March 2020 which is when he first made up his mind to merge NRL and RL.

In the event the '*restart of individual restructuring conversations'* was authorised on 12 May 2020 as can be seen on page 2012.

16.2 We are satisfied that during March and April AN reasonably continued to refine and reconsider certain aspects of the restructuring he wished to undertake in Global Lending and continued to gather additional information. There was nothing untoward about this process.

16.3 Secondly AN was conscious that throughout the initial stages of the pandemic the Bank remained committed to its costs targets but that also its revenues were likely to (possibly dramatically) reduce in the climate of deep instability created by covid-19. By June 2020 AN was convinced as an experienced senior banker that this included at the very least a 'slow down' of the NRL business and he explained this to the Claimant during the 10 June 2020 consultation meeting,

'*Right, if you look particularly through March you will appreciate that particularly on the recourse side that the business is going to be significantly impacted at least for the next few quarters…a significant slowdown when it comes to non - recourse lending with the IB* [Investment Bank] *side, with the corporate banking side given where the markets are'* (page 377C-F)

16.4 The Claimant was not convinced that NRL's extant or pipeline business would suffer as a result of the global pandemic. She did not agree that there would be a slowdown in NRL (see 380E) despite the fact that informally at page 251 she sent a message to a colleague, Hitesh Rao, on 26 May 2020 which reads '*in the current format my business is dead or pretty much dead'*. This is an informal 'chat' but the remainder of the messages do not indicate that the Claimant was being flippant or joking. We have seen an email at page 233 where Ms Peresson writes to the Claimant- '*new origination has been mostly put to a halt during the COVID-19 outbreak-slowdown of opportunities has been experienced by recourse and non-recourse teams alike'.*

16.5 As stated above it is not our task to resolve this dispute but only to reach a conclusion as to whether AN acted in an informed and non-arbitrary manner based on the expert information he obtained and reasonably chose the approach in which he believed.

We conclude that his choice was not tainted by unfairness, prejudice or discriminatory motives and/or actions. He formulated an appropriate and informed financial rationale which concluded that the NRL costs should be calculated in the way he considered accurate and that NRL revenues were small and likely to decline in the face of a serious global pandemic.

Thus he concluded that the expense and size of the NRL business in Europe did not warrant an MD role. This is not a perverse approach so far as we have ascertained from the evidence.

The Claimant invites us to conclude that these decisions by AN were not taken as a result of the rationale which he describes but were instead influenced by unlawful discrimination and unfairness. Our findings of fact do not support such a conclusion and nor do we infer one.

17. The pool for redundancy

17.1 After 12 May 2020 once the halt to redundancy 'conversations' was removed AN took steps to place the Claimant at risk and initiate individual redundancy consultation. He instructed SW to make the arrangements and the 'at risk' letter was sent on 1 June 2020.

17.2 AN concluded that '*the Claimant was in a pool of one and therefore no selection process or scoring needed to be carried out'.* He says that he did consider whether to instead make one or both of her junior reports redundant and also considered whether to place her in a pool with Mr Matharu meaning that whichever of those two MDs was selected from the pool would take charge of both RL and NRL in a combined team. Upon consideration as described below AN took the view that the Claimant could not do the merged job and that the dismissal of her junior staff did not make structural sense.

17.3 It is the Claimant's contention that these options were either not properly considered or were rejected wrongly and/or were not communicated to her as part of the consultation resulting in an unfair dismissal. She says that the evidence about the pool demonstrates facts from which we should at least draw an inference that the Respondent had the motivation and saw a way to end the employment of an older and/or woman employee.

17.4 Our findings of fact are as follows:-

First, the possible placing at risk of Ms Verma and/or of Mr van dem Hagen was discussed with the Claimant. Indeed it was a possibility which was specifically raised by her on 10 June 2020 as can be seen on page 381E. AN took the view, which was within a range of reasonable decisions, that neither of those more junior employees (Ms Verma only became a director in 2020) had transferable skills, the wide experience, acquired expertise and seniority which was comparable to that of the Claimant and they could not be pooled with her. Mr von Dem Hagen specialised in real estate NRL and Ms Verma in equity collateral.

In addition, during the consultation, AN again emphasises that '*both their costs are significantly low'* whereupon the Claimant suggests that both are taken together and selected for redundancy leaving only her salary costs in NRL.

17.5 Only by dismissing both of these employees as redundant would the saving amount to the same reduction in costs achieved by eliminating the Claimant's salary and bonus/commission. If that decision to dismiss both junior staff was taken then the Claimant would be obliged to run NRL by herself. AN took the rational view that this was not feasible, that she could not handle and filter the origination and the numerous enquiries sent through by relationship managers. He thought it was structurally implausible to have an MD with supervision and

management responsibility for no one. This option was considered during the consultation and it was reasonable to reject it.

17.6 SW says at paragraph 21 of her witness statement that, as HR advisor, she raised the possibility of a pool with the Claimant and her two junior directors but that AN and Mr Nasir did not deem it as an appropriate step given the differing levels of experience between the three employees.

17.7 AN answered a legally precise question put to him by HR. He wrote '*no'* in response to the penultimate question on the Proposed Business Redundancy Rationale form sent to him by SW and returned to her on 18 May 2020. The question (one copy of the form is at pages 1581-2 but other duplicate copies are in other volumes of the bundle) is,

'*has bumping been considered and is it appropriate to discuss roles with the employee(s)? A business may widen the selection for redundancy beyond those employees that are directly affected by the redundancy situation. The business can consider 'bumping' out of their jobs employees whose roles are not redundant to be filled by employees who are redundant. The business should consider if bumping is reasonable in all the circumstances (including into more junior roles)*

AN's negative response to that detailed and focussed enquiry shows that he considered the question of bumping and a wider pool which would have potentially included Mr Matharu.

He describes the Claimant's proposed redundancy as 'role elimination'. His answers to other questions in that Rationale document are consistent with the explanations given in his written and oral evidence to us and states his intention that '*the role will be taken on by Mitch Matharu expanding his current responsibilities …similar to the structure we already run in Americas and Germany with the non-recourse lending piece to fit under Mitch'.*

17.8 SW had also told him verbally as she states in her witness statement at paragraphs 21 that there was a risk of challenge about the composition of the pool and asked him to consider a wider selection which AN thought about and rejected. We find that the Respondent undertook its responsibility to carefully consider the pool.

17.9 Was the decision about pooling fair? was it motivated by bias in relation to either of the Claimant's two protected characteristics because it was so perverse and irrational as to demonstrate age and/or sex discrimination and/or can we draw an inference from AN's decision to write 'no' such that the Claimant's initial burden of proof is discharged. We do not find that this is the case.

17.10 Of course the Claimant did not see that Rationale document however we are satisfied that she was fairly and without unlawful prejudice against her as a woman and/or as an older person in the 55-60 age group told about this decision and properly consulted.

17.11 AN did not consider that the Claimant's role was comparable to that of Mr Matharu, most importantly because their revenues were so diverse. The

Claimant produced 6m euros and MM produced 59m euros with a not much bigger team of 3. (AN made a mistake and over-estimated this revenue at one point in his evidence at 69m; we draw no inference from the making of that error more than two years since the event). Pages 380-381 record a discussion between the Claimant and AN regarding relative revenues; the Claimant was made fully aware of AN's rationale.

17.12 AN considered MM's skills and experience which he knew well and went on to compare them with the Claimant's. He states at paragraph 22 of his evidence,

'*Mr Matharu had extensive experience in the Recourse Lending space across multiple jurisdictions and collateral types ranging from equities to hard assets (experience which the Claimant did not have) in structured deals and illiquid deals and he knew how to close, underwrite and monitor deals. He also had experience in Non-Recourse lending based on previous roles. The primary difference between Mr Matharu and the Claimant was that he focused on the most illiquid types of collateral…as far as I am aware the Claimant did not have the relevant experience for this role'*

17.13 We find that AN took advice and informed himself of the relative skills and experience of the Claimant and MM in connection with his decision to merge NRL and RL, the decision to put MM and not the Claimant in charge of the re-aligned team and not to pool them for a selection process. He talked to Mr Nasir, Mr Andrea Cozzi (Global HR Business Partner and Regional Head of HR in EMEA), with Mr Prasanna, and with Mr Cassavant. Each agreed with his conclusion that there was a 'stark' difference in the revenue which each MD generated. He spoke to MM about the feasibility of the proposed merger of the RL and NRL business but is quite certain that he did not discuss the Claimant herself or her personal business with MM. We have heard no evidence that this group of informal consultees were either unreliable and/or acted in opposition to the Claimant because of her age or sex.

It is, we find, unsurprising that many of these discussions took place without an email or other disclosed written record which might inhibit candour whether positive or negative in content toward the Claimant and/or MM. Our industrial experience is that this is quite usual. We rely upon the written and oral evidence of AN which was consistent under cross-examination on this point.

17.14 AN had undertaken in conjunction with Mr Nasir a documented analysis 'deal by deal' of the NRL and the RL business; he received regular snapshot reviews of all aspects of GL including NRL. He took the view that the effects of the covid 19 pandemic were likely to be 'disastrous' and told us, '*everyone knew this'.* In his oral evidence he robustly and credibly disagreed that these matters were just 'window dressing' for a pre-determined decision to dismiss the Claimant.

17.15 We cannot agree that AN only gave himself two months from January to March 2020 in which to familiarise himself with the Claimant and her work and her team nor that he made an irrevocable and final decision to place her at risk of redundancy before he had any idea of the true impact of the covid 19 pandemic

which emerged in March. We are satisfied that his initial instinct for this decision about the Claimant's business continued to emerge in his mind throughout April and May 2020 during which time he took steps to carry out further observation and analysis and to talk to others albeit without recording those sensitive and confidential conversations.

17.16 There is some doubt whether AN obtained or saw a copy of the Claimant's curriculum vitae. Certainly the copy in the bundle at page 179 seems to be a document sent to Mr Morley by the Claimant on 30 April 2020 but there are also several undated duplicates in different volumes of the bundle. In his witness statement AN says he did see the cv but then could not recall whether he had or not. A carefully prepared professional witness should have been able during his verbal evidence to recall the accuracy of his statement and resolve the question. However we cannot agree with Claimant's counsel that this indicates an overall lack of veracity and credibility in AN's evidence. It is an unfortunate discrepancy but taking the evidence overall in relation to his knowledge of the Claimant and her NRL business we are satisfied that AN informed himself conscientiously and accurately.

17.17 In terms of meetings with the Claimant we find that AN met with her once accidentally when they were both by chance in the Paris office and then for an introductory meeting of 15 minutes; the Claimant says this was on 14 December 2019 before AN took up his new role. Thereafter they spoke by telephone or video fortnightly for approximately 15 minutes on 9 occasions; AN is absolutely clear and stressed to the Claimant in the 10 June 2020 consultation meeting (paragraphs B and C on page 378),

'*exactly how I deal with you I deal with all my direct reports. I have fortnightly meetings where we go through in terms of what we have in a pipeline perspective, where we can grow, and what we can do'*.

There were also monthly meetings of the larger GL Managerial team which included the Claimant. She was a member of the Exco.

There was a short person to person discussion with the Claimant about AN's proposal to move one of the Claimant's team members Mehdi Nedjai out of NRL.

The Claimant did not agree with this step but after hearing her reasons in opposition AN decided to implement this staff move and we have heard no evidence that this was for any other reason than his managerial decision to improve efficiency.

At the fortnightly meetings AN and the Claimant discussed her current deals and her 'carry on' and AN asked her questions about the resilience of her pipeline business; in those discussions we are certain that as a senior MD the Claimant was able and enabled to assert her plans and strategies and give information.

There were revenue spreadsheets, as we have noted, prepared by Mr Nasir, reviewed and approved by the Claimant. There were regular Lending Flash Reviews incorporating NRL figures such as, for example, at pages 194-198. AN saw these and informed himself.

17.18. Socially, of course, a manager has no obligation to mix with any member of his team outside work. AN recalls perhaps going for coffee with the Claimant once. AN was not in regular attendance at any office social gatherings and only went to the pub on a Friday once. Any personal social interactions outside work were limited not least by the restrictions of covid 19 but also by the necessity for AN to travel abroad between January – March 2020 and his period of parental leave during the first two weeks of March 2020. The Bank's employees left their offices on 13 March 2020 in anticipation of the national lockdown. We are certain that the Claimant was not excluded or isolated from social interaction with AN or any other of her colleagues in a way which would not have applied to a hypothetical comparator in all the background circumstances.

17.19 In summary we are satisfied that AN took sufficient, fair and sensible steps to appraise himself of the size and nature including comparative complexity and profitability of both NRL and RL and the MDs in charge of both lending areas. He either already knew or obtained relevant information about their employment histories and their acquired skills and expertise as well as their reputations and contacts. Against that background it was not outside any reasonable, effective and efficient business decision to decide that the Claimant and MM did not have directly transferable skills, that MM should not be potentially 'bumped' and pooled with the Claimant and that she should be in a pool of one.

17.20 The Claimant was told of AN's intention to place her in a pool of one and he indicated clearly that he envisaged putting MM in charge of the combined team. The Claimant raised little or no query about the pool because she was first and foremost focused on her conviction that AN had failed to offer any sustainable financial rationale for the dissolution of her NRL team which she fervently wished to retain as a discrete entity. Paragraphs 30 - 32.3 of the ET1 for example set out the primary arguments of the Claimant as to the flawed rationale of her dismissal which revolve around financial and organisational unsustainability. The Claimant did not pursue the issue of the pool or her redundancy selection via any further consultation opportunities although these were offered to her.

There is a sustainable rationale, based on accumulated information about the Claimant and MM, for the pool of one. The evidence does not indicate that AN had simply made up his mind to dismiss the Claimant because he had the desire to rid the business of an older woman or that this was a fait accompli so that he never considered 'bumping' MM.

18. <u>Re-deployment</u>

18.1 We agree with the Claimant and indeed there seems to be no dispute between the parties that some of the roles available by way of possible redeployment for employees at MD level and above are to be found in what the Claimant calls the 'hidden job market' in contrast to 'open' roles where there is a specific vacancy posted, for example, on an intranet listing.

The hidden job market can involve the creation or adjustment of certain employment opportunities to create an ad hoc role for a senior employee which is unlikely to be advertised openly in the usual way. We agree that to find this type of opportunity requires considerable proactive effort by both the employee, using

her contacts and network and by the employer to give support to this type of initiative. The Claimant's allegation is that she worked very hard at leveraging her network to generate a redeployment for herself but that the Respondent offered insufficient support and at times actively obstructed her.

18.2 First, it is important to record that the Claimant's notice period was extended several times in exercise of the Respondent's relevant discretion. Her employment was due to terminate on 30 June 2020 and she did not in fact leave her employment until 2 October 2020. Those extensions were granted specifically to facilitate the search for redeployment.

18.3 We find that the Claimant was never prevented from approaching whomsoever she wished to speak to from her personal networks and contacts, for example, she created a document which is at page 271-282 detailing '60 Meetings with 23 Top Managers within DB' recording her personal efforts to pursue her contacts regarding redeployment opportunities.

18.4 There is no reason to doubt the detailed evidence given by SW in her witness statement at paragraphs 62-67 in which she describes how she and Ms Irving took steps to follow up on potential 'hidden' and other roles identified by the Claimant in this way.

18.5 There are what is called 'evergreen 'roles described by Mr Cozzi on page 477. We understand these jobs to be outside the actual open headcount of the relevant department of the Bank. Mr Cozzi says they are kept in reserve primarily for relationship managers with an established local client portfolio. SW at her paragraph 50 says that it is not possible to actually apply for such a role but that the cv of '*future talent'* are pipelined so that if a role opens up those individuals can be immediately contacted for exploratory conversations or *'canvassing the market'*. At page 532 in an email conversation with Ms Irving the Claimant confirms that she understands the process. We find that the Claimant was not excluded from any such 'evergreen' role and that her cv was placed with relevant recruiting managers in case a specific role opened up.

18.6 At page 477 Mr Cozzi does express the view that the Claimant is not likely to be qualified for an evergreen role, not on the basis that she did not represent internal future talent, but on the basis that she did not have a well-established and portable portfolio of clients in relevant local markets. This for example reflects Mr Lombardo's view of the US roles as set out below. No part of Mr Cozzi's email suggests exclusion of the Claimant from open vacancies or suggests that efforts to redeploy her should be reduced or discontinued.

18.7 We are satisfied that Kim Irving and SW did further assist the Claimant in exploring the hidden job market where they could, for example, at pages 677 (Singapore and Hong Kong) 785 and 786 (Americas and New York) pages 889 and 907 (reach out to Maytham Akbar)

18.8 This was done in addition to a comprehensive 'traditional' job search undertaken on her behalf. The redeployment efforts, with cross references to the relevant correspondence, are set out in paragraphs 48-57 of SW's witness statement. There is a 13-page table produced by the Respondent headed 'Annex

A' which sets out in exhaustive detail, citing the relevant pages of the volumes of the bundle, exactly what steps were taken to redeploy the Claimant and who was involved.

We are certain that the Respondent has discharged its obligation to take reasonable steps to avoid the Claimant's dismissal by reason of redundancy by exploring alternative employment for her. We are also satisfied that there are no inadequacies or failures around this process which might in any way be sufficient to discharge the Claimant's initial burden of proof in her discrimination claims. We agree with Mr William's submission on behalf of the Respondent at his paragraph 15 '*There can be no doubt that DB engaged in a genuine and reasonable search for suitable alternative employment'.*

SW,in paragraph 37 of her witness statement, strongly rebuts the Claimant's suggestion that the Bank had no open mind in approaching the question of redeployment, was determined to dismiss her and did nothing to proactively assist her. We agree that significant and genuine attempts were made by the Respondent to avoid the Claimant's redundancy by finding her alternative work within the Bank globally.

18.9 AN suggested, at page 2089, as early as 21 May 2020, that he would make some calls to other business units to see if any 'hidden' roles were available for the Claimant. He made one call to the Investment Bank in June 2020 which yielded no positive outcome.

In the context of the assertion by the Claimant that AN is the primary discriminator we looked by way of an example at the allegation against him that he 'shut down' an opportunity for the Claimant in the US which both SW and Ms Irving were assisting her to explore.

In the USA Mr Anthony Valvo asked, on 24 June 2020 (page 1010), to see the Claimant's cv despite the Americas HR Head Mr John Lombardo expressing reservations similar to those voiced by Mr Cozzi - '*its unlikely this candidate will have any contacts in our market and will not be able to ramp up and generate revenue quickly…she's not plug and play' .*

In fact Mr Valvo and his colleague Greg Kost in the Americas WM division eventually decided after numerous follow up calls from SW and Ms Irving not to pursue any employment of the Claimant. At page 1005 Mr Kost writes '*we can pass…I think that for the very limited (if any) space we have for hires right now- we really can't go outside the box'.* The feedback at page 1001 confirms '*this really does not have as much to do with her specifically… we have no to very limited headcount for new hires this year… we need to recruit bankers with existing books who can start moving clients over right away. So it's hard to take one of those precious spots for someone who isn't currently a banker who is also moving from London. She has very good skills but I just don't think we can get this done'.*

This rejection of the Claimant's potential candidacy clearly has everything to do with the state of the WM business which is not hiring. It is because the Claimant has no established client base to *'plug and play'* which might have secured her a

'non-traditional' or evergreen hire in the Americas team. There is no evidence of age and/or sex discrimination in the email streams. The reason why the Claimant is not re-deployed into this type of role is not because she is neglected or obstructed by the Respondent or rejected because she is an older and/or a woman. It is because in the end the Claimant did not qualify for an evergreen hire despite the efforts of SW and Ms Irving to support her and pursue these avenues.

18.10 AN does not involve himself until such time as the Claimant herself tells Ms Irving about a possible role on the lending team under Tom Clarke in the US which she has discussed person to person with Mr Valvo. It is only at this stage, because Mr Clarke is on mandatory leave, that AN intervenes to provide information to SW dated 6 August 2020.

The relevant email is at page 998. We do not agree that this is a decisive step by AN to 'shut down' the Claimant's possibilities for redeployment for reasons in any way connected to her sex and/or age. AN supplies clear information as to why the only open vacancy is unlikely to be the '*right fit* 'for her because it is a much lower level of seniority (Vice President/Director role) in Jacksonville and requires specific experience in subscription financing/capital call financing. He concludes however '*always good to be as supportive as possible to find redeployment if we can'* and he agrees to extend the '*termination date for a further week'.*

This process is dealt with in paragraphs 51-52 of AN's witness statement in which he confirms the unsuitability of the role for the Claimant and gives reasons.

18.11 At paragraph 54 of his statement, although SW confirmed to us that an extension of the notice period for three months or so (in the Claimant's case from 30 June to 2 October 2020) was not entirely unusual so long as viable redeployment opportunities were being actively pursued, AN states the reasons why he sought to bring the process of redeployment to an end. After all, to put it bluntly, his primary rationale was to save expenditure on the Claimant's salary and remuneration. We remind ourselves that the 2019 and 2020 redundancies to save costs were driven by managers higher up the Bank's structure than AN himself and to whom he was accountable.

Secondly, he knew of the almost total global hiring freeze and that the Claimant had just failed to progress to the next round of her application for the post of Global Head of Training and Development. It was not unreasonable or discriminatory for him to request in the absence of evidence of real progress into an identifiable vacancy that the redeployment efforts be concluded '*this month*' (September 2020) although no absolute deadline is imposed.

18.12 The Claimant gave evidence about Mr Matthew Sadd, a man in his forties and not named as an actual comparator. The Claimant alleged in her oral evidence that Mr Sadd was 'tipped off' in advance and found a new role when he was in danger of redundancy but not yet formally put 'at risk' during June/July 2019. By good fortune as he himself admits and with the assistance of mentors and friends he was redeployed without ever having the '*stigma*' (the Claimant's word) of being placed at risk and thus being identifiable as liable to be dismissed. The Claimant asks why this treatment of a not dissimilar colleague in similar unfortunate circumstances to hers was not afforded to her and says she was

treated less well but was unable in her responses to cross examination to say why.

First, we must point out that at the time of Mr Sadd's endangerment the 'freeze' on commencing consultation on new redundancies which was imposed by the Respondent during March – May 2020 was not in place. Discussions about his future were possible with Mr Sadd in a way which could not occur with the Claimant in the period immediately before she was placed at risk on 1 June 2020. Such discussions were prohibited.

Secondly there was, as Mr Sadd says in a message format conversation with the Claimant on page 1920, a '*champion' [Jamal*] supporting him in 2019. He says '*there were some big guns further up the food chain giving it a push'.* We find that in quite different circumstances Mr Sadd was lucky to have significant personal support. The Claimant does not suggest that this was because he is younger and/or a man. She simply points to the difference in treatment from which we cannot conclude either that the Respondent (she suggests the whole of the WM Exco) had an obligation to champion her on an individual basis in the same way as Mr Sadd had experienced nor that she was 'failed' in a way which amounted to discrimination. The reason why Mr Sadd had a better experience was because he had the personal network in the right place at the right time to obtain a sideways move for him. It was not because he is a man and/or was in a younger age group than the Claimant.

18.13 The Claimant referred us to the hiring of James Whittaker, now CEO of DB UK Bank and Head of UK WM, because she says she should have been invited to apply for his original post as Head of Coverage and Client Acquisition. However it has emerged from evidence that Mr Whittaker was approached as an external hire and given an oral offer of employment in February 2020 some time before any of AN's decisions around the Claimant's redundancy were formulated. In other words this position was unavailable by the time the parties began to explore redeployment. Similarly with Adam Russ who did not obtain his role as Co-Head of IPB Lending until it was created in February 2021 after the Claimant had left the Bank.

18.14 SW was frank in her evidence that she was unaware of a role in WM in Belgium which was taken up by Gilles Staquet (a man aged 45) and which might have been a suitable job for the Claimant. Mr Staquet transferred into that job from London at some time between February and August 2020 There was confusion in the information supplied or not by the HR partner in Belgium; the process is un-documented because SW lacked the information at the time and candidly said so. There is no evidence beyond that of some incompetence and muddle that the Claimant was discriminated against and denied a role (which SW and her team knew nothing of) because she was a woman and/or older than Mr Staquet. This error does not make the redeployment process or the Claimant's dismissal unfair.

19. The total picture

19.1 We have made findings below about a number of events and circumstances during the course of the Claimant's employment to which she drew our attention.

This is because, as Mr Devonshire KC urged upon us, we must look at '*the eloquence of the total picture'.*

19.2 First, we are certain that, prior to being placed at risk and despite any negative aspects of the historical picture, the Claimant made clear that she wanted to stay at the Bank possibly for the remainder of her career and that she '*loved DB'* and the business she was building. She gave no indication that any allegations of pre-redundancy discrimination or of a sexist and/or ageist culture and background at the Bank were sufficiently damaging to her so as to change that extremely positive attitude to her work.

19.3 Secondly, it is part of the total picture in the context of the sex discrimination allegations against him, to examine AN's actions in promoting women. Both the Claimant and Ms Wong were, at AN's behest, asked to sit on the Lending Exco. Ms Wong was promoted to head the Emerging Markets team in May 2020. In addition AN nominated Ms Rebekah Flohr to replace Mr Clarke in the Americas upon Mr Clarke's retirement and he appointed Ms Swasi Bate as Co-Head of Risk for the Americas WM division. AN's actions do not indicate a manager determined to defeat and discriminate his female colleagues in a female phobic culture although we take the point made forcefully by the Claimant that the number of women employed overall by the Bank is considerably smaller than the number of male employees.

19.4 There were a few untoward and even unpleasant experiences, some up to seven years old, which the Claimant relates in her witness statement none of which involved AN or others involved in the Claimant's redundancy process and dismissal. No person said by the Claimant to be part of any of these historic acts had any responsibility for the decisions relating to her redundancy which are in the List of Issues. The Claimant did not formally raise any of these matters at the relevant time with any of her managers as being incidents of sex and/or age discrimination.

None of those involved with her redundancy for example called her by the nickname 'Christine Lagarde' which is a rather silly and probably annoying comparison with the current President of the European Central Bank based solely, it would seem, on the fact that both the Claimant and Madame Lagarde are women, are French and have grey hair. We make no finding that this comparison was offensive or indicates a 'culture' of discrimination against older women. It is part of the irritation of day to day office life which occasionally occurs. The Claimant pursued no formal complaint or grievance about it.

19.5 Similarly the Claimant refers in her witness statement in paragraphs 4.7, 6.3 and 6.4 to having been deprived of a proper office (which she says was not any form of individual discrimination) and to bullying and harassment of her by Mr Daniel von Heyl in November 2017. However under cross examination the Claimant conceded that Mr Van Heyl (who departed fairly soon thereafter) was appointed and supported during any incident of conflict with her not because he was younger or because he was a man but because of his network of 'friendships' in the business including Mr Marcus Schenk who hired him in the first place. These are incidents occurring well in advance of any of the matters set out in the List of Issues and none of them involve AN or any decision maker responsible for

the redundancy process or for the Claimant's dismissal. Mr Todd Stevens for example is said to have made sexist and ageist comments but he was uninvolved with any aspect of the Claimant's departure from the Bank and she raised no complaint or grievance about him or his actions at the time. He was not a witness in this case.

19.6 The remarks of Mr Salman Mehdi

On 16 June 2020 the Claimant spoke to Mr Mehdi ((Global Vice Chair of WM) whom she had always regarded as an ally because he had been keen to recruit her and have her on his wider team when she first came to the Bank. She made a brief note of their conversation at page 1893 under a heading '*Resume Salman'* which she then recorded more fully at page 1909 by sending an email to herself as was her usual habit. She states at the email on page 1909 that Salman Mehdi had said '*I had had a series of bad bosses over the years. He also said that the Bank had a major problem with senior women, that DB is unable to accompany them in their career".*

The Claimant also refers to this conversation in her letter of appeal at page 1395.

The Claimant relies heavily on the evidence of this conversation with Mr Mahdi (SM) to show that the treatment she received because of her age and/or sex was acknowledged by him as being part of an embedded culture and that the lack of 'senior' women within the Bank is part of a pattern encompassing the aim of preventing, obstructing or removing such employees and resisting diversity.

First, we are unsure whether '*senior*' in fact refers to women in the Claimant's age group. It may be a reference to status or title at the upper tiers of management whatever the age of the relevant employees. If that is the case it does not support a link to age discrimination. SM did not give evidence to us in this case or speak to the appeal decision makers. He is still employed at a senior level within the Bank.

Secondly it appears that the Claimant has slightly edited her original note at page 1893 to remove SM's positive opinion of AN where he is noted as saying '*Arjun is smart/what is his rational?'*(sic). We find this to suggest that perhaps SM thought there was a 'smart' rationale. The Claimant does not however record that more favourable observation of AN by SM.

In her original note she writes not of a major problem at DB with '*senior women'* but records SM's remark as being that the Bank have problems in '*following along. Loss of money, loss of time. It is a reality and we don't' deliver'.*

Our reading of the comment as originally and contemporaneously noted on page 1893 is that SM opined that the Bank has failings in relation to the development and retention of '*senior women'* as is, in our experience across both the private and public sectors, not uncommonly perceived and experienced; SM clearly believes that solutions need to be identified. He comments that these failings results in a waste of time and money for 'DB'. We do not however interpret SM's remarks as confirming that the Respondent mis-treats or discriminates against

older employees and/or women and/or is motivated to remove them from the workforce via the redundancy process or by driving them out in any other way.

Unfortunately SM, when interviewed by Ms Arekatla over a year later on 26 August 2021, during the grievance investigation meeting not only denies having made even these fairly constructive comments but also makes hurtful and inconsistent remarks about the Claimant (having previously praised her and her work to her face).

He criticises her performance in a way not evidenced by any other document in the bundle and of course she was not dismissed for capability or conduct reasons.

We do not intend to set out those comments in this publicly published judgment save to say that in the absence of SM as a witness in these proceedings we believe the Claimant's documented account of their conversation at the time albeit that we attach little significance to it.

19.7 AN's interaction with the Claimant

It is the Claimant's contention that AN had limited interaction with her and much less social and professional contact with her than he did with the '*other men'* with whom he discussed her performance and her business '*behind her back'*; she says that we should infer from this scenario that AN was more at ease and comfortable with *'the guys'* and thus selected her for redundancy for discriminatory reasons because she fell outside this clique by reason of her age and sex. This is entirely denied by AN and we find that he had the same level of professional 'office' contact as with all his other direct reports as set out in detail above.

We find that he did not have the calendar space to have spent extended time in meetings with younger male colleagues from which the Claimant was allegedly excluded. AN credibly described his limited involvement with office social life. There was insufficient time given his business and travel commitments, his new baby and the pandemic restrictions for him to be frequently socialising with others to the exclusion of the Claimant. Neither the Claimant nor AN nor his other male and/or younger reports were physically in the office after 13 March 2020 and thus the Claimant was unable to observe his working relationships face to face with anyone. The Claimant has shown no evidence from which we can conclude that AN was '*uncomfortable*' or *'patronising'* in his interactions with her or that she was treated less favourably than any actual or the hypothetical comparator.

19.8 The RL meeting in Geneva in January 2020

This 24 hour meeting organised by Mr Cassavant was attended by AN and the Claimant was not invited nor were any other members of the Exco except Mr Cassavant and AN there. AN was not responsible for the invitations. We find that the Claimant did not receive an invitation because she was not involved with recourse lending. She was not excluded because she was a woman and/or because she was in an older age group than the other participants. A hypothetical comparator would similarly not have been invited to attend because this was not an off-site business meeting about NRL. It was put to AN that the Claimant should

have been on the guest list because at the time of the Geneva meeting he had already formulated an intention to merge NRL and RL. Our finding is that this intention did not crystallise until March 2020 and was subject to reconsideration and reformulation during April/May 2020.

19.9 The decision to relocate one of the Claimant's team,Mr Mehdi Nedjai

We have already made findings of fact about this discussion between AN and the Claimant. AN, who was after all the boss, took the decision to move Mr Nedjai out of the Claimant's team and into RL for business reasons only. AN discussed this with the Claimant who disagreed with his decision but was ultimately obliged to accept this minor staff restructure. We are certain that, in AN's phrase, he would '*follow the same steps with any manager male or female'* and exercise his managerial prerogative to make such a decision. There is no evidence to the contrary.

20. The Burden of Proof in alleged discrimination.

In summary, and for all the reasons set out above which are based upon our findings of fact we have determined that the Claimant has failed to discharge her burden of proof and show us a prima facie case that, because of her two protected characteristics of age and sex, she was put at risk, exposed to the redundancy process and ultimately dismissed.

The 'something more' required to show her prima facie case may not need to be anything more than unexplained unreasonable conduct on the part of the Respondent significantly influencing its actions and omissions in order that the burden of proof passes to employer. However we find no such conduct.

In summary the reason why the Claimant was placed at risk and, following consultation and then a comprehensive search to re-deploy her, was ultimately dismissed was because she was redundant. The Bank had need of less employees to do the work, however important, complex and demanding and no matter how integral to its GL business, which she did and she was fairly and reasonably selected for redundancy. This has been a crushing blow for her but it was not sex or age discrimination.

21. Unfair Dismissal

21.1 The Claimant was the only employee from amongst the 2020 redundancies to appeal her dismissal. The notes of her appeal meeting on 22 December 2020 are at pages 1554-1572 from which it is clear that she was able to fully ventilate and explain her appeal to Mr Zielenski and Ms Dave and respond to their questions. No significant new evidence was produced to the appeal. Neither of the appeal decision makers are identified as discriminators by the Claimant. We find the appeal to have been conducted in a fair, conscientious and impartial way. The outcome letter is at pages 1693-7 and was delivered without undue delay on 29 January 2021.

21.2 The Claimant says, through Mr Devonshire's closing submission, that there has been no proper or conscientious appeal although she makes no point about

this or indeed any reference to the appeal in her witness statement. When her ET1 Claim was lodged the appeal outcome was still outstanding but she has never sought to amend her claim or to provide further particulars by way of complaint about the conduct of the appeal. The appeal stage is of course part of the dismissal process although the ACAS Code does not require an appeal in cases of redundancy dismissal as opposed to conduct or capability dismissals.

21.3 We conclude that, because we find no flaws and particularly no discriminatory factors in the dismissal procedure, it is not necessary for us to consider whether the appeal cures or remedies any irregularities or unlawfulness.

21.4 We have set out above the text of the fairness test and the relevant statutory language of section 98 of the 1996 Act. We are satisfied that the reason for the Claimant's dismissal was redundancy which is one of the potentially fair reasons. We are certain that in all the circumstances the actions of the Respondent in dismissing the Claimant fell within the range of reasonable responses that a reasonable employer could adopt in relation to warning of, and consultation about, redundancy, the composition of the pool, the selection for redundancy. The decision to dismiss, taking into account equity and the substantial merits of this case, was fair.

After four months involving an extensive and proactive redeployment search by both parties it was not possible to find a suitable alternative role for the Claimant and she was inevitably dismissed on 2 October 2020.

No aspect of the Claimant's dismissal was tainted by discrimination for all the reasons set out above.

22. A note on one of the appeal findings

There is an important finding of the appeal decision makers recorded at paragraph 38 of Mr Zielenski's witness statement with which we strongly agree. It relates to a remark by AN about '*hiring the right people'* made on 10 June 2020 and can be read in context at page 385C. This paragraph recording AN's comments has been made much of by the Claimant and her representatives. Mr Zielenski concluded that' *Mr Nagarkatti did not say that women were not the right people and I do not take from that transcript or from our interview with Mr Nagarkatti that this is what he meant'.*

At the redundancy consultation meeting AN says in response to the Claimant's query as to why there is no woman running any business line in GIobal Lending in the UK –*'The UK business is fairly small. Again we have to look to always make sure we hire the right people…to do the right business. Actually there's – and I don't know what it is, I mean we hire the right people, we always make sure we've got the right people to try and make sure we've got a balance. That's the best I can do'.*

The Claimant invites us to conclude that AN is thereby saying that there were no women who were '*right*' for those GL roles in the UK and ignores the Claimant's concerns. We cannot agree with this interpretation. We find, as Mr Williams KC urges us to do at paragraph 33 of his closing submission that a statement that a

business seeks to hire the right people is a *'statement of the obvious'*. It does not demonstrate a predetermination by the Respondent's recruiters that no women can be the 'right people'.

AN's response was at worst a little clueless and out of date. However immediately thereafter SW reassured the Claimant about the Respondent's diversity initiatives and policies around future recruitment and promotion of women.

Incidentally SW did not describe any formal age diversity initiatives by the Respondent which it may wish to consider as a future task.

23. Our unanimous decision is that the complaints of unfair dismissal, sex discrimination and age discrimination do not succeed and are dismissed.

Employment Judge B Elgot
Dated: 9 January 2023