



EMPLOYMENT TRIBUNALS

Claimant: Adrienne Liebenberg

Respondents: 1 DS Smith Packaging Ltd
2 Miles Roberts
3 Stefano Rossi
4 Tim Ellis

Heard at: London Central

On: 24-28 February, 2-6
and 9-13 March 2020
(29 May 2020 in chambers)

Before: Employment Judge H Grewal
Mr J Carroll and Mr D Kendall

Representation

Claimant: Mr T Brown, Counsel

Respondents: Ms D Sen-Gupta, Queen's Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

- 1 The complaint of victimisation is dismissed upon withdrawal;
- 2 The complaint of direct sex discrimination is not well-founded; and
- 3 The complaint of indirect sex discrimination is not well-founded.

REASONS

1 In a claim form presented on 6 March 2019 the Claimant complained of sex discrimination. Early Conciliation (“EC”) in respect of each of the Respondents was commenced on 5 February 2019 and the EC certificates were granted on 8 February 2019.

The Issues

2 It was agreed at the outset of the hearing that the issues that we had to determine were as follows.

Direct sex discrimination

2.1 Whether any of the Respondents directly discriminated against the Claimant because of sex by dismissing her 14 November 2018. The Claimant relied on the following comparators and a hypothetical comparator:

- (a) Marc Chiron;
- (b) Thomas Kure Jakobsen;
- (c) Thibault Laumonier
- (d) Herve Colleaux; and
- (e) Philip Beutil

Victimisation

2.2 It was not in dispute that what the Claimant said to Liza Strong in an interview as part of gender diversity research commissioned by DS Smith amounted to a protected act under section 27 of the Equality Act 2010;

2.3 Whether the Claimant was dismissed because she had done the protected act or because any of the Respondents believed that she had done the protected act.

Indirect Sex Discrimination

2.4 Whether any of the Respondents applied any of the following provisions, criteria or practices (“PCPs”) (the wording is that of the parties and not the Tribunal):

- (a) The particular characteristic(s) of leadership style(s) expected of senior leaders;
- (b) The particular characteristic(s) of “taking a collaborative approach” expected of senior leaders;
- (c) The particular characteristic(s) of “contribution to the management team” expected of senior leaders;
- (d) The particular characteristic(s) of “relation[ship] and impact with own team and larger organisation” expected of senior leaders;
- (e) The particular characteristic(s) of collegiality expected of senior leaders;

(f) The particular characteristic(s) of “effective communication” expected of senior leaders.

2.5 Whether they applied any of those PCPs to the Claimant;

2.6 Whether the PCP(s) put women at any particular disadvantage(s) when compared with men;

2.7 Whether the PCP(s) put the Claimant at any such advantage(s);

2.8 If so, whether the Respondents showed the PCP(s) to be a proportionate means of achieving a legitimate aim. The Respondents relied on the legitimate aims of requiring senior leaders to:

- (a) have an appropriate and effective leadership style;
- (b) adopt a collaborative approach with teams and senior colleagues;
- (c) make an appropriate and effective contribution to the management team;
- (d) have effective relationships and positive impact with the team and larger organisation;
- (e) adopt an appropriate collegial leadership style;
- (f) effectively communicate with colleagues.

3 The complaint of victimisation was withdrawn after the conclusion of evidence on 12 March 2020.

The Law

4 Section 13(1) of the Equality Act 2010 (“EA 2010”) provides,

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

Sex is a protected characteristic (section 4 EA 2010).

5 Section 19 EA 2010 provides,

“(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation a relevant protected characteristic of B’s.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of b’s if –

- (a) A applies, or would apply it to persons with whom B does not share that characteristic,*
- (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
- (c) it puts, or would put, B at that disadvantage, and*
- (d) A cannot show it to be a proportionate means of achieving a legitimate aim.*

(3) The relevant protected characteristics are –

...

Sex.”

6 Section 23(1) EA 2010 provides,

“On a comparison of cases for the purpose of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.”

7 Section 136 EA 2010 provides,

*“(1) This section applies to any proceedings relating to a contravention of this Act,
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned. The court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.”*

8 In **Igen Ltd v Wong [2005] ICR 931** the Court of Appeal gave guidance, which was approved by the Supreme Court in **Hewage v Grampian Health Board [2012] ICR 1054** on the application of section 136 EA 2010. In summary the guidance is as follows:

- (1) It is for the claimant to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of adequate explanation, that the employer has committed an act of discrimination;
- (2) In deciding whether the claimant has proved such facts, it is important to bear in mind that it is unusual to find direct evidence of sex discrimination. In some cases the discrimination will not be an intention but merely based on the assumption that “he or she would not have fitted in”;
- (3) In deciding whether the claimant has proved such facts, the outcome at this stage of the analysis by the tribunal will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal;
- (4) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts;
- (5) Where the claimant has proved facts from which conclusions could be drawn that the employer has treated the claimant less favourably on the grounds of sex, then the burden of proof moves to the employer;
- (6) To discharge that burden it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex;
- (7) A tribunal would normally expect cogent evidence to discharge that burden of proof.

9 In determining whether there are facts from which the tribunal can infer sex discrimination, the tribunal must have regard to all the material facts and is not limited

to considering only the evidence adduced by the claimant – **Laing v Manchester City Council [2006] IRLR 745.**

10 The burden of proof does not shift to the employer simply on the claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate the possibility of discrimination. They are not, without more, sufficient material from which a tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination – **Madarassy v Nomura International PLC [2007] IRLR 247.**

11 A tribunal is not entitled to draw an inference of discrimination from the mere fact that the employer has treated an employee unreasonably and that the employee in question was a woman – **Glasgow City Council v Zafar [1998] IRLR 36.** However, sex discrimination may be inferred if there is no explanation for the unfavourable treatment. That is not an inference from the unreasonable treatment itself but from the absence of any explanation for it – **Bahl v The Law Society [2004] IRLR 810,** per Gibson LJ at paragraph 101.

12 If the tribunal is satisfied that the prohibited characteristic was one of the reasons for the treatment in question, that is sufficient to establish direct discrimination. It need not be the sole or even principal reason for the conduct; it is enough that it is a contributing cause in the sense of a “significant influence” – Lord Nicholls in **Nagarajan v London Regional Transport [1999] IRLR 572, at 576.**

13 In recent years the higher courts have emphasised that in cases where there is no actual comparator, or where there is a dispute about whether a comparator is an appropriate comparator, tribunals should focus on why the claimant was treated in the way that he or she was treated. Was it because of a protected characteristic? The point has been made, among others, by Lord Nicholls in **Shamoon v Chief Constable of the RUC [2003] IRLR 285** (at paragraph 11), Mummery LJ in **Aylott v Stockton on Tees BC [2010] IRLR 94** (at paragraph 41 – “*There is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others?*”) and Underhill J in **Cordell v FCO [2012] ICR 280** (at paragraph 18).

14 The treatment of a person who does not qualify as a statutory comparator (because the circumstances are in some material respect different) may nevertheless be evidence from which a tribunal may infer how a hypothetical statutory comparator would have been treated. That is an ordinary question of relevance, which depends upon the degree of the similarity of the person in question (the “evidential comparator”) to those of the complainant and all the other evidence in the case. – **Watt v Ahsan [2008] 1 AC 696, per Lord Hoffman at paragraph 36.**

15 In order to establish particular disadvantage to herself and her group, it is not necessary for the claimant to prove her case by the provision of relevant statistics. These, if they exist, would be important material. But the claimant’s own evidence, or evidence of others in the group, or both, might suffice – **Games v University of Kent [2015] IRLR_202, at paragraph 41.**

16 section 112(1) EA 2010 provides,

“A person (A) must not knowingly help another (B) to do anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 111.”

The Evidence

17 The Claimant and Chiara Covone (Director of Market Development, Group Strategy and Innovation) gave evidence in support of the Claimant’s claim. The following witnesses gave evidence on behalf of the Respondents – Stefano Rossi (Chief Executive Officer, DS Smith Packaging Ltd), Miles Roberts (Chief Executive Officer, DS Smith Group), Tim Ellis (HR Director, DS Smith Packaging Ltd and then HR Director, Group’s Corporate Functions and Employee Relations), Jacky Wearn (Group Head of Talent and then Interim Group HR Director), Thibault Laumonier (Regional Managing Director, France), March Chiron (SMI Director, France and then SMI Director, DS Smith Packaging Ltd), Wim Wouters (Brand and Experience Director), Jordi Cazorla (Managing Director, Southern Region), Elisabeth Schmidt (Director of Account Incubation and then Business Development Director), Paul Brown (Finance and IT Director, DS Smith Packaging Ltd) and Iain Simm (Group General Counsel and Company Secretary).

18 We had 15 lever-arch files of documents before us. The witness statements comprised over 450 pages. We commented at the outset, and many times during the hearing, that the volume of documents in the case was excessive and disproportionate to the narrow issues that we had to determine.

19 Having considered all the oral and documentary evidence, the Tribunal made the following findings of fact.

Findings of Fact

20 The DS Smith Group (“the Group”) is a global company which designs, produces, supplies and recycles packaging products. It has grown considerably over the last seven or eight years by acquiring other companies. It operates in more than 37 countries and is divided into packaging, paper, recycling and plastics divisions. The First Respondent (“R1”) is the packaging division of the Group. It is the largest division in the Group and its head office is in Brussels.

21 Stefano Rossi is the Chief Executive Officer (“CEO”) of R1 and has been in that role since September 2014. He previously worked for another company which was acquired by the Group in 2012. He is based in Brussels and reports to Miles Roberts, Group Chief Executive Officer. Mr Roberts has been Group CEO since 2010. Tim Ellis joined the Group in 2012 and at the relevant time was the HR Director of R1.

22 Although R1 has central teams to cover various functions (such as sales, marketing, finance, HR) it is run along decentralised lines. At the relevant time it had regional teams operating across nine geographical regions in Europe (covering about thirty countries), and the profit accountability for those lay with the Regional Managing Directors of those regions. Collaboration between the central and regional teams is crucial to the success of R1. The central sales team was responsible for managing R1’s pan-European or global clients and for the overall sales approach. The pan-European clients ordered products across a number of different countries. The central team decided the pricing of the orders to ensure consistency, but the responsibility for delivering at that price lay with the regions in which the product was

required. This sometimes led to tension between the central team and the regions. In addition, the regional teams had their own local clients. The local clients were the majority of R1's customers.

23 When Mr Rossi became CEO of R1 he developed the role of Commercial Director. The role had always had responsibility for managing pan-European accounts but he wanted it also to be responsible for ensuring that sales accounts were managed consistently across the regions and for there to be a greater focus on marketing and innovation. This role later became the Sales, Marketing and Innovation ("SMI") Director.

24 In about March 2016 R1 advertised the Commercial Director role. That role, along with four other functional Directors and nine Regional Managing Directors, reported to Mr Rossi and comprised the Leadership Team of R1. The Management Team of R1 comprised Mr Rossi and the five functional Directors. The responsibilities of the Commercial Director role were sales, marketing, pricing and margin management. The job description for the role stated that the Commercial Director would "*be primarily responsible for the development of its current key customers into major global accounts*" and that he or she would "*need to find a balance between global and local priorities ensuring that local leadership remains empowered but key account management moves to the forefront of go-to-market strategy.*" The job description stated that the ideal candidate should have "*evidence of working at a high level on the development of effective commercial strategy with the ability to get hands on and work effectively with regional management teams.*" It also stated that candidates would "*need to prove that they can operate successfully in the lean and fast paced operational environment of DS Smith. They will be able to deliver successful outcomes without a large support network and infrastructure.*" Listed as a critical success factor for year one was the delivery of a 100-day plan.

25 R1 appointed a firm that specialised in Executive recruitment to find someone for the role. In the latter half of 2016 the firm produced a shortlist of appropriate candidates and sent their CVs to R1. Messrs Rossi and Ellis reviewed the CVs and selected those that they wanted to interview. Male and female candidates were interviewed. One of those interviewed was the Claimant. She was interviewed by Mr Rossi, Mr Ellis, Miles Roberts, Paul Brown (Finance Director) and Nigel Hayter (Group HR Director at the time).

26 The Claimant had an impressive CV having held global marketing roles since 2006. Since 2012 she had been Global Marketing Director at BP Castrol. An assessment report produced on the Claimant's psychological profile as part of the recruitment process said that she was a strong candidate but pointed out "*she is coming from a very large organisation so there may be some adjustment and she has a distinct communication style and so it will be important that she feels that her style fits in with any potential colleagues.*" The same report also said, "*Adrienne gives the impression of a strong team focus but beneath this is highly independent.*"

27 Mr Rossi noted that the Claimant was stronger and had more experience in marketing than in sales, but he was impressed with her technical skills and thought that she had the potential, drive and acumen to make the step up to the position. She was his preferred candidate and after discussions with the other interviewers she emerged as the unanimous choice, and Mr Rossi decided to offer her the role.

One of the internal applicants for the role was Marc Chiron (SMI Director in France).

28 On 10 November 2016 Mr Rossi offered the Claimant the role of Commercial Director. The offer letter said that she would be principally based at R1's Head Office in Brussels, but the expectation was that she would be required to travel extensively for the role. It was recognised that her family home was in the UK and she was deemed to be a commuter. Her remuneration package was a basic salary of £200,000 per annum, a discretionary bonus of up to 50% of her salary and participation in a performance share plan ("PSP") of up to 50% of her salary. It was made clear that any awards under the plan would lapse in the case of "bad leavers". In recognition of the unvested awards that the Claimant was going to forfeit with her current employer by resigning, R1 made the following additional awards to her – a one-off gross payment of £100,000 as soon as practicable after joining and a special one-off PSP award of 100% of her base salary. R1 offered her a competitive and lucrative remuneration package because it was very keen to recruit her. The Claimant accepted the offer on 15 November 2016.

29 The contract of employment was signed on 4 December 2016. The contract provided that, after a probationary period of six months, each party had to give the other six months' notice to terminate the contract but that R1 could terminate the contract with immediate effect by paying her in lieu of notice.

30 The Claimant commenced employment with R1 on 20 March 2017. She had nine direct reports in the central team.

31 On 27 March 2017 Mr Rossi had a meeting with the Claimant and set her five targets in order to give her direction about the things on which she needed to focus. These included spending time in the Regional Business to "*better understand the why/how*", improve the quality of the internal communications and to understand the quality of the deals which the central team made (i.e. the pricing and the margin). He told her that the perception of the central team was that they did not know the reality of the business, they promised a lot (more than the regions could deliver) and they brought bad deals which the regions had to implement.

32 On 8 May 2017, a few weeks after starting, the Claimant sent an email to all the Regional Managing Directors and Sales Directors telling them that she had set up the Contract and Tender Council ("CTC") which would have six permanent members and she would chair. It would regularly review large multi-country tenders and commercial proposals and make recommendations to the business on the commercial and pricing approach. It would also deal with regional disagreement and make recommendations to resolve them. The recommendations would be conveyed to the Regional Sales Directors and if there was still disagreement the Regional Managing Directors could raise them with her and she would take the matter to Paul Brown or Mr Rossi for decision.

33 Mr Rossi was supportive of the initiative and thought that it was a very good idea. Thibault Laumonier, Regional MD for France, expressed the view that it would be better if initiatives like that were discussed with regional MDs before they were launched so that they could have an input into the discussion. He said that it was necessary "*to work as a management team.*" That was an early indication of a problem that was to become bigger later – Regional MDs feeling that they were not included in discussions about changes that would affect them.

34 The Management Team (“PMT”) (Messrs Rossi, Brown, Ellis, David Grantham, Mark Shaw and the Claimant) held a one-day meeting once a month in Brussels. The team often went out for a meal after the meeting. Messrs Rossi and Brown had worked together for many years as they had both worked at a company that was acquired by R1 in 2012. In the early days of the Claimant’s employment Mr Ellis had conversations with the Claimant, as he did with other senior recruits, about Stefano Rossi and Paul Brown’s ways of working and the best ways of making contact with them and getting their attention. However, he did not say to the Claimant that she should aim to join “the gang” because that was necessary in order to survive within R1. The Claimant made no reference to anything like that when she was interviewed as part of the Gender Diversity review. Mr Rossi, on occasions, checked football scores on his mobile phone during meetings.

35 The Leadership Team (“PLT”) met once every three months at a hotel in Europe. The Claimant was the only woman on the Leadership Team. The meetings lasted two days and some attendees arrived the night before the meeting started. At the end of the first day of the meeting, there was normally a dinner at a restaurant away from the hotel. Sometimes it was organised by Mr Rossi, at others by the Regional MD in whose area the meeting was being held. The dinners normally lasted about three hours or a little longer and there was wine available for those who wanted it. The number of bottles consumed was normally half that of the the number of attendees. The conversation over the dinners covered a variety of topics – people’s families, holidays, homes, interests, etc. We have no doubt that football came up in the conversation sometimes, but it was not the only or the dominant topic of conversation.

36 The Claimant’s evidence in her witness statement was that Mr Rossi often arranged for the Leadership and Management teams to go to wine and whisky tastings. In cross-examination she accepted that she had attended one whisky tasting with the regional team in Scotland and one wine tasting in Italy. Neither of those had been organised by Mr Rossi.

37 On 7 July 2017 the Claimant sent Mr Rossi her draft of a new organisation structure for the Commercial section. It involved expanding the existing structure considerably. Mr Rossi felt that it was not realistic and demonstrated that the Claimant did not understand the budget restraints within which R1 operated. The Claimant was due to have a meeting with Paul Brown and Tim Ellis about the document. Mr Rossi sent them an email on 17 July 2017 in which he said,

“I hope that you will manage to bring her to a more sensible approach because what I have seen so far will not make us fly with her.

... the attached plan, but this is not us, we might there in x number of years, but not now – please make sure she understands that this is a stretch we are not prepared to absorb and she has to be more practical, with both feet on the ground.”

38 In that email, he also expressed other concerns about the Claimant’s attitude. Some of the Regional MDs had complained to him about the approach that the Claimant was taking with them and the Sales Directors who reported to them. They felt that she was telling them what they had to do rather than working collaboratively

with them and listening to them. Mr Rossi also felt on the basis of what he had heard that the Claimant was adopting a haughty approach to her junior staff. She had made reference over dinner to her large property and an infinity pool. The Claimant had also told Mr Rossi that Thibault Laumonier should be removed as she did not believe that he was at the right level. In his email of 17 July, Mr Rossi said,

“What worry me with Adrienne is not the knowledge but rather the attitude – she is very distant from the organisation and for what I have seen so far, she tends to avoid engaging with “lower” level, including her direct reports!

Unfortunately, this was my fear, the rather high-class attitude, probably coming from her personal background and the big corporation she used to work with. I’m convinced that she can bring a lot to us, but we have to quickly understand if she will be able to work with us – which means work with the entire organisation – if you know what I mean.

She is very fast in judging, too fast actually, because to some individuals she does not even give the time to express, given the fact that she does not really talk to them – also, she has to forget about the fact that we might change key people based on her approach -e.g. Thibault in France – she has to learn to cope with the good and the bad of the organisation.”

39 Mr Brown and Mr Ellis met with the Claimant on 19 July 2017 to discuss her organisation structure. Mr Brown challenged the Claimant about the costs of her structure and the budget required to implement them. He told her that he agreed with the end result which she was striving for in terms of future structure and ways of working but it was not possible to do everything at once as they did not have the finance or resources to do so. She needed to progress in incremental steps as part of a longer-term plan.

40 Although Mr Rossi had concerns about the Claimant’s attitude, he supported her. In August 2017 the Claimant was critical of a team that had lost a valuable contract because it had misjudged the situation when negotiating with the client. Having read her email, Mr Rossi sent an email to Philip Bautil, Regional MD for Benelux, and said that he thought that the Claimant had a good point and asked for his view. Mr Bautil explained the position as he saw it and said that he had not reacted to the Claimant’s email because he found that it was too easy to criticise people who had to make a difficult decision when something went wrong and that the Claimant had not offered any help. Mr Rossi told him that he should provide a response to the Claimant. He continued,

“perhaps you can select a cooperative tone and express what you write below in a way that you would appreciate to sit around the table to find a good way forward, rather than to be dismissive. It is important, because either we start to cooperate seriously or it will only go wrong.”

41 By the end of summer 2017 the structure of R1 had changed. The number of regions had been reduced to five and two new business units (Industrial Packaging Solutions and Market Activation) had been added. Jordi Cazorla, who had started working for R1 at about the same time as the Claimant, was the Regional MD for Spain, Portugal and Italy. On 20 September 2017 he found out that the Claimant had agreed a sale for his team in Italy which involved a significant price reduction which

would impact on their profitability. He sent the Claimant an email in which he said that she first sent him an email on about the contract on 19 July and he had discussed it with his team and had had contacted her the following day asking to talk to her so that they could agree the best solution. He had chased it up the following day. He had heard nothing from her until he had received an email, that day informing him of the new agreement with a significant price reduction. He continued,

“In this email it is stated that I have agreed with it and my name is used several times. In one of them it says that you have said that I have agreed with this price reduction and agreement.

*It has been used my name for something which is simply not true and on top of that it has been used without my knowledge. **This is unacceptable.** [his emphasis]*

...

Adrienne, I found this situation completely unacceptable and not respectful with the team in Italy and with me as well. It brings massive stress to a situation of a complicate organizational change, enormous frustration and non-understandable financial issue. I am planning to escalate it to Stefano but obviously I prefer to talk about it with you in advance and understand it fully.”

42 The Claimant’s initial response was to acknowledge that he was right be to very annoyed and to apologise. In a later email, she provided some justification for her actions on the basis that it was the first time that that particular client had issued a pan-European tender, and although there was much that her team needed to do to improve in terms of communication, it felt like the outcome (becoming the client’s preferred supplier in Europe for certain products) justified the costs and was fully in line with R1’s strategy. Mr Cazorla responded that he understood the difficulties but his concern was the way the central team worked with the local teams.

43 On 27 September the Claimant held the inaugural Sales Forum meeting with four Regional MDs and two others. The Sales Forum comprised the Claimant and the Regional MDs and was to meet quarterly to discuss, inter alia, growth plans, sales policy and account plans and budget. The intention was that the Sales Forum would review and approve three types of accounts – pan-European accounts, cross-regional accounts and incubation accounts. Incubation accounts were defined as *“key accounts in six months ‘rehabilitation’ or material accounts which we are tendering for and will be ‘incubated’ for six months post win”*. She explained that the first category would be managed by the central team and that each cross regional account would be managed by a manager in one of the countries. At that meeting the Claimant also shared with the Regional MDs her new structure for the division. It was to be renamed Sales, Marketing and Innovation.

44 A second Sales Forum meeting took place on 3 November. The Claimant received positive feedback from the Regional MDs about those two meetings and what was discussed. Jean Lienhardt thanked her for organising *“this session which is bringing drive, clarity and responsibility in the D Smith sales strategy.”* Mr Cazorla thanked her for the *“very constructive meeting”* that they had had and said, *“I think we have taken very valuable decisions that will improve the ways of working. Thanks for taking this initiative”* After the meeting on 3 November Mr Laumonier said in an email, *“I’d like to thank you for today’s session and congratulate you for the impressive step made in bringing true marketing into the Division after 6 months with DS Smith. I am very confident that you set the base for future progress.”*

45 On 8 November the Claimant sent the Regional MDs a list of accounts which she said fell into one of the three categories and identified in each case the category into which it belonged. Mr Laumonier expressed the view that as 'incubation' was a status, the accounts with that status should fall into one of the other two categories and should not be a separate category. His view was that three French accounts (LVMH, Lactalis and Coty) which had been identified as incubation accounts fell into the cross-regional category and should be managed by France. The Claimant did not agree with that and said that the accounts had to be in Incubation and managed by her team.

46 On 22 November 2017 the Claimant announced the new structure of Sales, Marketing and Innovation ("SMI"). The central team, which would be mirrored in each region, would consist of six integrated functions – (i) Sales, (ii) Marketing, (iii) Customer Experience, (iv) Innovation, Products and Ventures, (v) Commercial Operations and (vi) the Academy. Sales would be driven on five fronts – (i) local accounts, which made up the majority of R1's accounts would be led by the region in which they were situated, (ii) key accounts (pan-European/global) accounts would be managed by the central team, (iii) each region would lead on a number of cross-regional accounts guided from the centre, (iv) incubation accounts would be led the Innovation, Products and Ventures team and (v) online sales would be managed from the Customer Experience function. There were many more roles in the new structure than in the existing structure. Most, but not all, of the existing staff were appointed to roles in the new structure. There needed to be recruitment to a large number of roles.

47 In about November 2017 the Claimant informed David Grantham (Technology and Manufacturing Director) that one of his employees (Valentin) who was moving to work for R1 in the US, winked at her in greeting when he passed her in the corridor. She said that it did not bother her but that it might well expose R1 in the USA to complaints. Mr Grantham spoke to the employee in question about it, who had not been aware that he had been doing it. He stopped doing it after Mr Grantham spoke to him about it.

48 In December 2017 DS Smith entered the FTSE 100 Index. In January 2018, Andy Speak, who had been appointed Group HR Director in September 2017, was asked to look at gender diversity within the Respondent Group. His initial research showed that the Group Operating Committee ("GOC") and the Executive did not have any female representation. At the next level down, the leadership roles within various divisions, 9 out of the 54 roles were occupied by women. In discussions on the issue in January Mr Speak informed Miles Roberts that the Hampton-Alexander Review had recommended that action be taken to achieve a target of 33% women in FTSE 100 leadership teams by 2020. Mr Roberts' response was that that was not a realistic target within that timeframe. He said that in the long-term DS Smith could improve gender diversity but it was difficult because only 7% of engineering graduates were women.

49 On 11 January 2018 Mr Rossi sent an email to everyone in the Leadership Team that following an extremely difficult December it appeared that at the end of its financial year R1 would be £25 million short of its target. He said that they needed to do everything possible to maximise profits over the next four months. He listed various steps that needed to be taken. He said that there would a recruitment freeze

with immediate effect and that all non-business critical recruitments should be put on hold.

47 On 30 January the Claimant sought Mr Rossi's approval to move ahead with the next stage of recruitment in the new structure. Mr Rossi responded that he agreed with it in principle but that they, the management team, needed to be "*in full alignment regarding the resources available in the framework of the Budget and Corporate Plan*". The point he was making was that her expectations had to be realistic and to fit in with the budget that they had.

48 On 15 February 2018 Mr Rossi and the Claimant had a meeting. They discussed the restructure and the budget that was available. The Claimant had been seeking approval for 57 new roles. Mr Rossi approved 20 new positions. There was also a discussion about the need to improve the Management Team dynamic. This centred on the relationship with the regions and needing to spend more time with them. In an email he sent to the Claimant after the meeting he set out in detail what he had approved for the SMI structure. He ended the email by saying,

"As agreed, there is the need to improve the Management team dynamic, In this respect I count on your willingness and experience to help making it happen!"

49 At a GOC meeting in March 2018 Andy Speak did a presentation on Inclusion and Diversity. It was agreed at the meeting that in the first quarter in 2018 (May to July) the Group would launch research to understand and remove obstacles for women to progress their careers at DS Smith, and would consider the findings from the research and any action plans in the second quarter.

50 In March or April 2018 Mr Rossi called the Claimant and David Grantham (Head of Technology and Manufacturing) to a meeting because they were always having arguments at Management Team meetings. He said that they were not being good team players and encouraged them to work more collaboratively and to resolve their differences before Management Team meetings. They denied that they were not good team players and the Claimant said that in order for the PMT to work more effectively as a team they needed to have more strategic off-site meetings.

51 On 18 April 2018 Miles Roberts met with Stefano Rossi to go through his annual Performance Development Review ("PDR") with him. In the course of that meeting they discussed the performance of Mr Rossi's direct reports. Concerns were raised about the performance of a number of individuals, including M1, M2 and M4 whose employment was terminated later. Mr Roberts' view was that Mr Rossi needed "*to be tougher on underperformance and at an earlier stage.*" The contemporaneous note that was made about Mr Rossi's comments about the performance of the Claimant was,

"Adrienne – will become an issue as attitude not right with regard to management and people, performance of team, costs and resources, personal life/work balance. Consider new role as Global Customer Head and recruit under her."

Mr Rossi was concerned that the Claimant's style was dictatorial and that she was not engaging properly with her direct reports, more junior employees and the regions.

He also said that she did not have regard for the costs and resources that the Group had available. Mr Rossi also expressed some concern about the fact that the Claimant travelled to the US for weekends once or twice a month as her partner lived there. He was concerned about the impact that that could/might have on her ability to deliver in a demanding role as she commuted from London to Brussels and travelled extensively as part of her job. Mr Rossi raised the possibility of creating a different role for the Claimant that would reduce her interaction with others in the business and would allow her focus solely on developing strategy. Mr Roberts was not in favour of that as he believed that they had achieved the correct structure for that part of the business and did not think it wise to change the structure to accommodate a performance issue. His view was that they had spent a considerable amount of time and cost in recruiting the Claimant and they should try to make it work. It was agreed that Mr Rossi would discuss his concerns with the Claimant at his PDR meeting with her on 25 April to try to turn the situation round.

52 On 23 April the Claimant sent Mr Rossi a draft PDR form. She set out the objectives that she believed had been informally agreed and what had been achieved. She also set out what she considered to be her successes and disappointments. In it she referred to the inability to recruit to some roles because of budget constraints and the impact of that on implementing SMI strategy. Under "Disappointments" she wrote,

*"I have been given feedback that I have not been **a team player** on the PMT. Partially I think, this is because I am considered too honest about whats going on in my part of the business. Going forward I will try to be a better judge of what information should be communicated upward or not, recognizing Stefano that you are will manage [sic] as appropriate. Throughout the course of my career this is not the normal way I have seen it working, it is a very different approach and has taken some time to adapt. As a PMT we haven't been able to spend time together and this has not brought us together as a strong unit, which I need to work on under Stefanos leadership."*

She concluded by saying,

"Overall I have loved working at DS Smith and am hugely excited about going forward from the platform we have built this year."

53 The Claimant also gave herself markings on how well she had displayed the leadership competencies expected of her. The possible markings are "Developing", "Competent", "Professional", "Advanced" and "Expert". The competencies assessed are strategy, judgment, drive for results, learning and growth and managing teams. The Claimant marked herself as "Expert" for drive for results and "Advanced" for all the other competencies.

54 Mr Rossi read the Claimant's draft PDR form and made manuscript notes on it and in a notebook in order to discuss with her at the PDR meeting on 25 April.

55 The Claimant's PDR meeting with Mr Rossi took place on 25 April 2018 in Brussels. Mr Rossi began the meeting by having a general discussion about the direction that SMI needed to take and the issues that it needed to address. He did that by raising matters about which he had made notes in his notebook (such as price recovery, quality and service, customer management in relation to cross-

regional and incubation accounts, the ultimate structure of global sales) and his views on the comments made by the Claimant in relation to her objectives. He pointed out that that she needed to develop SMI strategy within the budget that was available and not blame shortcomings on the budget constraints. The general discussion took longer than anticipated because the Claimant did not always agree with and accept what he said. He did not get round to having a discussion about his concerns about her and her comments on the feedback that she had been given about not being a team player. Following the meeting the Claimant sent Mr Rossi the draft PDR in Word, as requested by him, and wrote "*Thanks for a good discussion.*"

56 As Mr Rossi had not specifically raised with the Claimant his concerns about her, he invited her to a second PDR meeting on 30 April 2018. They had a long discussion about the feedback about her not being a team player. Mr Rossi said that the problem was not that she was "too honest" but that she did not work in a collaborative way with her colleagues. He said that he had not sought to restrict what she said to senior management, but had pointed out to her that it was not conducive to positive working relationships to continually blame her colleagues both in the regions and in other functions and to criticise them to their managers. It was a tense meeting because the Claimant did not react well to the negative feedback.

57 On 1 May the Claimant sent Mr Rossi a draft PDR having altered the paragraph relating to the feedback about her not being a team player. She asked him to let her know whether that better reflected the sentiment of the conversation that they had had in the PDR. The amended paragraph read as follows,

*"I have been given feedback that I have not been a **team player** on the PMT. Which I think is really about adapting to a different style of working in a new company – I have tended to be quite detailed about my part of the business. Going forward I will try to be a better judge of what information should be communicated. In addition, as a PMT we haven't been able to spend enough time together and, given I have been learning the business and culture, at times this has resulted in miscommunication."*

58 On 9 May the Claimant reminded Mr Rossi that her PDR was outstanding and said that she would appreciate a return copy of it and clarity on the rating that he given her. She received no response and chased him again for it on 29 May. She asked him whether he had had a chance to provide comments or think about her objectives for the following year. She also said that she wanted to know her performance rating. Mr Rossi responded on 30 May that he would try and finish it within a week.

59 At a PLT meeting in May 2018 Thomas Klure Jakobsen (Regional Managing Director) lost his temper when expressing his concerns about the regions not being listened to enough in the CTC sessions. Mr Rossi said to him that any disagreements between managers should be dealt with in advance of the team meeting. There was then a heated exchange between Mr Jakobsen and Mr Rossi. Mr Rossi told him that he was entitled to raise issues with the SMI team about performance and transparency and "to give them a good kicking" if necessary, but he should resolve any conflicts as and when they arose and not wait until the team meeting to raise them. Following this meeting, Mr Jakobsen sent the Claimant an email in which he apologised for "*coming across as intimidating and not willing to listen.*"

60 On 31 May and 1 June 2018 the Leadership Team in Packaging attended a Talent Calibration meeting for the senior managers who reported to them. Jacky Wearn, who was Group Head of Talent and Development, also attended the meeting. At the Talent Calibration meeting employees are given a rating based on their performance and potential. The matrix (talent grid) that is used for scoring is as set out below. On the table performance is indicated vertically (moving from bottom to top) and potential horizontally (from left to right).

High Performer B7	High Performer with Potential A8	Exceptional Talent A9
Good Performer B4	Good Performer With Potential B5	Good Performer With High Potential A6
Reassign or Re-scope C1	Potential Performer C2	Potential Talent C3

61 The calibration exercise involved 77 employees, 13 of whom were women. Six of the women were senior managers in the Eastern Europe region, the Managing Director of which was Jean Lienhardt. Out of the thirteen women, two were rated A8, five B7, one A6, one B5, one B4, one C2 and one C1. The female managers in Eastern Europe were rated A8 (one), A6 (one), B7 (three) and B4 (one). The majority of the women were given higher ratings and we do not accept the Claimant's perception that the default view of the women was negative and that a lot had to be done to change it.

62 Mr Lienhardt expressed his views about his reports in English. Although he spoke English well, it was not his first language. In respect of one of his female reports he wanted to say that she was very good, but they would not want to be managed by or report to her. It might have been in relation to the manager about whom it is recorded in the notes of the meeting *"Done very good job ... She is demanding and challenging."* What he said was that she was good *"but you wouldn't want her on top of you."* Some of those present laughed because of the sexual innuendo of the phrase he used. It was not what he meant by the remark.

63 At the same calibration meeting Marc Chiron was graded A8. The notes in respect of him recorded,

"He is a very strong sales person. He is being developed by giving him some P&L responsibility for the Systems business and he has gripped it within 3 months. He is both strategic and operational; he demonstrates courage and humour. There are some issues though – he is not particularly tolerant of other people, particularly those working for him and people don't trust him? He is not very collaborative with the CBU directors and other central SMI resources. He can be elitist and rude. These issues to be worked on during Global Leadership programme, eg coaching/360?"

... Next step is out of France. Clear talent, needs to polish his soft skills and focus on Values."

Mr Laumonier, Mr Chiron's line manager, was mainly very positive about him. Many of the negative comments about him were made by the Claimant.

64 At a meeting with the Claimant on 12 June 2018 Mr Rossi told her that Philip Bautil (a Regional Managing Director) had told him that the Claimant had not been happy that he (Mr Bautil) had raised his concerns about the price level of the Pan-European accounts and the pressure being put on the regions to recover the paper price increase directly with Mr Rossi without discussing it with her first. He said that Mr Bautil had said that he had felt unable to raise it with her because of the way she had reacted in the past when he had raised similar concerns. He felt that she took it personally.

65 On 13 June 2018 Mr Rossi sent an email to Miles Roberts about matters that he wanted to discuss with him at a video meeting the following day. One of the matters to be discussed was a proposal to have fewer but larger regions. The proposal was to have three regions – North, South and East. There was to be a discussion as to who was to head each of them. Mr Rossi said that he was not prepared to give the role of Regional MD for North to Mr Jakobsen and thought that it would be wrong to have him report to the new MD. He said, *"therefore we have to find a new role for him or there is a decision to take."* It was proposed that Mr Cazorla would head the South region and that Mr Laumonier would report to him. He also expressed his views on the Management Team. He said the following about the Claimant,

- *"Technically highly skilled – Adrienne has brought the role to another level and dimension in DS Smith.*
- *Need to improve three areas (very important):*
 - *Relation with the lower level of the organisation (impact!)*
 - *Relation to the P&L (cost awareness!)*
 - *Have a more dynamic contribution to the leadership team (belonging!) – this point is also linked to the somehow difficult match between her private life and the business agenda*
- *She has certainly skills, competence and knowledge but I do not honestly believe that she will be a long term resource for the company – we can discuss more during our meeting*
- *Also, we need to strengthen the Innovation function – would like to discuss some idea (interesting you mention Marc Chiron because he is a possible name that I had in mind since quite some time)*
- ***ACTION – MIGHT NOT BE IMMEDIATE, BUT I THINK WE SHOULD START A DISCREET SEARCH/EVALUATE ALTERNIATIVES."***

Mr Rossi discussed the matters raised in his email with Mr Roberts at the meeting. He also explained that he had had difficulty in completing the Claimant's PDR because she had reacted negatively to the feedback that he had given her. Mr Roberts was not prepared to give up on the Claimant just then and he advised Mr Rossi to discuss the matters with the Claimant to see if he could find a way of rectifying the problems that had been identified. Mr Rossi was not very effective at completing formal performance management processes and his approach was to deal with matters informally by having chats. This was not unique to his management of the Claimant (see paragraphs 144 and 168 below).

66 One of the things discussed at the meeting was to move the “Market Activation” section led by Richard Saysell to SMI and for Mr Saysell to report to the Claimant. Mr Rossi communicated that decision to the Claimant and Mr Ellis on 15 June 2018. He asked them not to make the announcement about the change until he had had an opportunity to speak to Mr Saysell which he was due to do on Wednesday (20 June).

67 On 15 June Mr Rossi’s PA told the Claimant that he wanted to meet with her in London on 20 June 2018 and a meeting was arranged for 1.30 p.m.

68 At the meeting with the Claimant on 20 June Mr Rossi talked to her about the move of Market Activation into her section. It was not a PDR meeting and he did not discuss her performance or provide any feedback in relation to it. He had already decided at that time the rating that he was going to give her (“meets expectations” for both performance and leadership competencies and B5 on the talent grid), but he did not discuss them with her because he knew that she would not accept them and it would be a difficult discussion. His failure to do so reflects poorly on his management skills.

69 The Talent calibration meeting of the leadership roles by the GOC took place on 21 June 18. Prior to the meeting Mr Rossi sent the GOC the data in respect of his reports. He gave the Claimant a performance rating of “Meets Expectations” and a potential rating of “Beyond role.” His talent box rating for her was B5. He did not change the markings that she had given herself for leadership competencies. He set out her development needs as follows,

“Adrienne needs to improve her contribution to the dynamic of the leadership team. She also needs to develop stronger awareness of the cost element of the business.”

In terms of her future potential he said that she could *“take more effectively a Global Sales and Marketing role within the Group.”*

70 The note made about the Claimant at the Talent Calibration meeting was,

“been with DS Smith a year now, confirmed B5. Has definitely moved things forward in terms of the strategy for Global customers. More confident as an expert than as a manager.

- *Action: Stefano to continue to set clear expectations with Adrienne and to clarify what support she needs i.e. coaching. Jacky to support this.”*

71 Mr Rossi rated eleven of his direct reports. With the exception of the Claimant they were all men. Five of them (including the Claimant) were rated B5. Two were rated higher (A8) and four were rated lower (B4 and C1).

72 The GOC Talent Calibration involved about 117 employees, 15 of whom were women. Over half the employees were rated B4 or B5 (37 were rated B4 and 25 B5). 21 employees were given an A rating (19 of them were rated A8) and 17 employees were given a B7 rating. 17 were given a C rating. Out of the 15 women, 7 were rated as B4 or B5 (4 were rated B4 and 3 B5). One was rated A8, 5 were rated B7 and 2 were given a C rating.

73 On 28 June 2018 the Claimant sent Mr Rossi another email about her objectives for 2018-2019. She set out in that email what she believed her goals for the year to be and said that as they were already two months into that year she would take them as final unless she heard otherwise from him. Mr Rossi responded on the same day that he agreed that they should finalise the formal paperwork, although they had already had the conversations which he considered to be the most important part. He promised to give her the paperwork with his feedback and the targets (which were in line with what she had drafted) by the following Monday.

74 On 10 July the Claimant sent an email to Andy Speak in which she explained that she had asked Mr Rossi several times for her performance rating and he had not provided it. She said that she would prefer the email to stay between the two of them as she did not *“want to throw Stefano under the bus here.”* She simply wanted to know what her rating was and why she had got that rating as she wanted to be clear in the thinking about her status and future in DS Smith. She assumed that he knew what the rating was and that it had been submitted as part of the calibration. She just wanted him to tell her what it was.

75 Mr Speak raised the matter with Mr Rossi and Mr Rossi met with the Claimant on 12 July 2018. He was annoyed that she had gone to the Group HR Director about it and the Claimant explained why she had done so. He told her that her rating was B5 and the Claimant made it clear that she was disappointed with that rating. Mr Rossi did not provide much verbal feedback for that rating but said that he would give her the written feedback in her PDR document later that day. The Claimant thanked Mr Speak for the meeting and told him that she was disappointed with the B5 rating.

76 Later that day Mr Rossi sent the completed PDR to the Claimant. He said that he would arrange a final meeting with her to complete the PDR session. He said that the aim of his feedback was to produce an even better performance from her and he hoped that she would take it *“with the necessary positive spirit.”* He marked her as having “achieved” all her objective (as opposed to “not achieved” or “exceeded”) and gave her an overall rating of “Meets Expectations”. In relation to the objective of being a people leader and team member, he commented, inter alia,

“we should not over-estimate the buy-in of the organisation, there is still a lot of work to do to embed the way of working in the real business routine of the organisation.”

His general comments included the following,

“Adrienne has demonstrated exceptional technical knowledge around her area of expertise – in taking over the SMI function she has demonstrated ability to articulate a strategy and the entire Sales, Marketing and Innovation function work today at another level – I thank Adrienne for this achievement... but being part of the management team of a Division goes beyond the area of expertise, it requires the ability and willingness to understand time and budget constraints, working in team to build a roadmap to set the organisation to work in direction of the implementation of the vision. This is valid also for any sort of issues that we might have in our Regions, which are an integral part of the governance chosen to run our business ; we win and we lose together, therefore our functional resources are expected to work closely with the Regions to overcome any possible issues and to share the success.”

77 The Claimant and Mr Rossi met on 20 July 2018 but there was no further discussion about the PDR. Thereafter Mr Rossi was on holiday until 13 August.

78 In the summer of 2018 there were further heated discussions between Messrs Laumonier and Chiron on one side and the Claimant on the other as to whether LVMH and Coty should be classified as Incubation accounts and managed by the central SMI team or should be classified as Cross-Regional accounts and managed by France where the larger part of their business was.

79 There were also further discussions about budgets in the summer. On 12 July Mr Brown attended a meeting with the Claimant and Paul Clarke (the new Operations Director). It had been decided that Research and Development (R&D) would move from SMI into Operations. There was a dispute between Mr Clarke and the Claimant as to how much of the budget for that team should transfer from SMI to Operations. Mr Clarke said that he was relying on the calculations done by the previous head of the section of which R&D had been a part. The Claimant accused him of being incompetent and having used the wrong figures to get a higher amount as he was transferring to Mr Clarke's team.

80 On 20 July the Claimant sent Mr Roberts an email to explain why she had not been able to answer his question at a meeting about the contradiction between someone else raising an issue about a general risk on volume and her showing a 5% growth. She said that she did not have accountability to commit to sales across all the regions and could only influence them. She said, *"I can tell you that in my area - key accounts- we will be able to deliver and likely deliver more."* Mr Roberts responded,

"We report externally on the overall volume increase as well as progress with large customers. I know that your expertise is not only driving the results in the large customers but strongly influences the more regional accounts. Any help, challenge, support you can give to these is very important and needed."

He was making the point in that email that her role was not limited to just growing the key accounts but also involved supporting the regional accounts.

81 Mr Ellis used the word "girlie" to describe women and might well have referred to the Claimant as a "girlie" but he did not say to her that the problem was that Messrs Rossi and Roberts thought of her as a "girlie" and therefore did not react seriously with her. If he had said that, she would have reported it at the gender diversity interview. She did not.

82 In the beginning of August 2018 Andy Speak and Jacky Wearn asked Liza Strong (Interim head of Engagement, Diversity and Inclusion) to conduct the gender diversity research which had been approved by the GOC in March 2018. She began by interviewing the women and a few men in the senior leadership roles. Tim Ellis and Jacky Wearn knew that the Claimant was one of the people she was going to interview.

83 On 23 August HR informed Mr Brown and Mr Ellis that the Claimant had authorised recruitment to four new roles which had not been included in the budget for her team. She was seeking to recruit to those roles from staff who were being

made redundant from another part of the business. Mr Brown sent an email to Mr Rossi about it. The Claimant was due to go on holiday on 25 August. He said that he had a number of concerns about the recruitments, one of which was that they were not in the budget. He proposed a temporary holding position and continued,

“this will buy us the time until Adrienne gets back and we can discuss the full SMI recruitment status v Budget and will avoid causing any issues or worries for Adrienne as she should go and enjoy her holiday.

Tony and Lisa will complete the reconciliation of recruitments on-going vs Budget and will take us both through it next week.

... the whole approach is ignoring the reality of the Budgets – but no point in creating a mess just now.”

84 The Claimant was on annual leave from 25 August to 3 September.

85 On 28 August Liza Strong sent an email to the Claimant asking her whether she was willing to be interviewed for research that she had been asked to do into the experiences of and the obstacles faced by senior women in DS Smith. She said that all the data she collected in her interviews would remain anonymous and that at the end she would share with the GOC the broad insights gained without identifying individual views.

86 In response to concerns raised by another potential interviewee about the sharing of the information, Ms Strong told her that she would keep all the interviews on her own drive so that HR could not see them, she would delete from them anything that might identify the interviewee, she would delete everything off her computer before her contract ended in December 2018 and no one else had permission to see the raw data.

87 A Leadership Team (“PLT”) meeting was scheduled to take place at Lucca in Italy from 3 to 5 September 2018. The Claimant was supposed to give an update on SMI on 5 September from 11.30 to 12.45. On 31 August (Friday) Mr Rossi sent the Claimant an email in which he suggested that she focus on the following in her update – volume development for Key, Cross-Regional and Incubation accounts, any possible short-term opportunities, status of the price increase campaigns, new tenders coming – risk and opportunities, any area where stronger co-operation between regions and the CBUs might get better results.

88 The Claimant asked her direct reports to send her slides on volume and price, price actions and tenders. At 6.25 p.m. on Tuesday 4 Sept they sent her 6 slides.

89 Just before 9 am the following morning the Claimant sent Mr Rossi’s PA the slides that she wanted to use in her presentation. They included slides showing growth against price increases for Key, Incubation and Cross-Regional accounts. These showed the figures (in Euros) for 2017-2018, the forecast for 2018-2019, the growth between 2017/18 and 2019/20 and the average price evolution (increase or decrease in the price). Some of the other presentations overran and in the end the Claimant had much less time to do her presentation. As part of her presentation the Claimant used some of the above slides. The Cross-Regional accounts had some figures under the forecast section and the majority of the entries under “price evolution”

showed 0%. The figures under the forecast for 2018/19 had been taken from the 2019/20 Corporate Plan. That column was incorrectly headed, as is clear from the heading of the next column. The Claimant used the figures to show that the Cross-Regional accounts were not profitable and that that was attributable to the way they were being managed. The Regional Managers asked her where she had got the figures from because they did not recognise the figures and knew that some of them (for example, the 0% for price evolution) were incorrect. The Claimant said that even if some of the figures were incorrect it did not change the picture that she was presenting. The Regional Managers were upset by what they perceived as the Claimant publicly insulting them at a Leadership meeting.

90 It was agreed at the meeting that the Claimant would distribute the SMI material excluding the Cross-Regional Accounts Pricing page and would provide an update of the Cross-Regional figures.

91 Following the meeting the Claimant sent to the Regional MDs the slides that she had intended to use at the meeting but excluded the slides showing growth against price increases for the Cross-Regional accounts. Mr Laumonier asked her to send him the pricing tracker on the Cross-Regional accounts so that he could check for himself the true numbers for France.

92 She also sent Mr Rossi an email asking for a short meeting the following day. She wanted to speak to him about a member of her team who had resigned in July and was working out his notice period. At the meeting in Lucca Mr Jakobsen had approached the Claimant and Mr Rossi separately and said that the employee who had resigned was poaching customers from R1 and that his employment should be terminated immediately. The Claimant disagreed.

93 The Claimant and Mr Rossi met on 6 September. They discussed the employee in question and it was decided that he should not be present in the London office and should ultimately go to the office in Belgium to do a handover. Mr Rossi told her that her approach at the meeting the previous day had been inappropriate. The Claimant said that she had not had enough time to check the figures. Mr Rossi said that if she had not had time to check them she should not have presented them or should at least have explained that they needed verification rather than presenting them as accurate information. He said to her that it was wrong to attend a meeting and to use figures to attack regional MDs without having shared them in advance with them. He said that they needed to work collaboratively rather than blame others. He asked her whether she felt that she was a part of the team.

94 The following day Mr Rossi had a meeting with Mr Laumonier. Mr Laumonier complained about the Claimant's conduct at the Lucca meeting.

95 In September the Claimant attended an internal event at which she was to speak with the Chief Procurement Officer. When she arrived, he greeted the Claimant by saying "hello little lady". The Claimant mentioned that in passing to Mr Rossi a week later and Mr Rossi shook his head to indicate that he did not think that it was acceptable.

96 On 7 September the Claimant was interviewed by Liza Strong for the Gender Diversity Research. The Claimant's answers included the following comments - career development was not discussed or taken seriously at DS Smith; she had

written her own objectives, not had a performance review and had had to ask for her rating seven times; they were poor at managing people and the reaction was to move people around the business rather than to performance manage them; 95% of people moves were decided before the roles were advertised and people were placed into roles based on network connection rather than merit; she could see roles that she could go into but did not believe that a woman would be given the opportunity for such roles; the senior leaders needed diversity, gender, cultural and unconscious bias training; she thought that gender was an obstacle to progression in DS Smith because of the very sexist views they held; women had to be better than men to get ahead; at performance reviews women were debated with emotion and scrutiny while men got the nod; the experience for women was about 9 hour dinners and making decisions in that context; there was a benevolent sexism, wrapped in a paternalistic approach, examples of which were being called “girlie” or “little lady”; inappropriate comments were made, such as “She’s a good girl but you wouldn’t want her on of you”; women were greeted by kissing while men had their hands shaken; the practice of winking was not appropriate; diversity was non-existent for Miles Roberts, there was not a single woman on the leadership team; she believed that women made him feel uncomfortable.

97 On 10 September Ms Strong sent the Claimant the notes of her interview to correct or amend them.

98 On 10 September Mr Roberts had dinner with Paul Brown. He asked him how things were going with the Claimant. Mr Brown said that he found her very challenging; although she had extensive sales and marketing knowledge, the scale of her agenda and the cost and the way she treated others in the team was a problem.

99 Tim Ellis returned to work from holiday on 10 September. During that week Mr Rossi told him about Lucca meeting.

100 On 13 September Alex Manisty (Group Head of Strategy) sent an email to the Claimant and Mr Rossi to ask whether the Innovation paper was ready as Mr Roberts had been consistently asking for it to be available in advance of the meeting on Monday (17 September) and his view was that it would help the discussion if he saw it before the meeting. Mr Rossi responded that the paper was ready but that they (he and the Claimant) had not the chance to review it together. He said that they hoped to do so that evening and would share it with him the following day. The Claimant had hoped to discuss it with him the previous day, but they had not done so.

101 On the same day the Claimant met with Mr Roberts in his office at her request. She asked him not to tell Mr Rossi about the meeting. She said that she had prepared the Innovation plan and showed him an envelope which she said contained it. However, Mr Rossi did not want her to share it with him until he had reviewed it. She did not want him to think that she had not done the work.

102 She then asked him whether she could speak to him about her relationship with Mr Rossi. She said that she had a difficult relationship with him because he was insistent on a number of things, in particular, he was too controlling of her work and objectives. She said that she wanted to have a better understanding of his management style and Mr Roberts discussed how he was very fact-based, organised, maintained regular contact with his team and was focused on performance. He also reminded her that they had “leadership/personality” profiles of

their senior managers and she could access them to help her understand Mr Rossi. He also suggested that she contact Andy Speak to arrange to see the profiles and to discuss her concerns.

103 Towards the middle of September Mr Rossi began considering terminating the Claimant's employment. He asked Mr Speak and Mr Ellis to put together some figures about what a termination package might look like. On 18 September Mr Ellis sent some calculations to Mr Speak. These showed that the Claimant would be entitled to a little over £100,000 for her notice period, about £45,000 for her bonus and about £185,000 for the value of performance share plan ("PSP") awards. However, some of these payments could be forfeited or lapse depending on the Claimant's leaving status.

104 The Trading meeting took place on 17 September and the GOC met on 18 September. That evening Mr Rossi sent an email to his Leadership team. He told them that the results of the Division were "*simply too far*" from where they needed to be. He said after four months they had delivered an EBITA (earnings before interest, taxes, etc) of £24.8 million against a budget of £52.6 million. He said that he was aware that there had been a lot of challenges but they were business challenges that they were expected to manage when they came. He said that the whole organisation needed to be aware of the need to maximise the result for the first half and to be involved in delivering that. He said that they needed to "*approach and be aligned on this as ONE Division.*"

105 Mr Rossi was due to have a video conference with Miles Roberts on 20 September. On 19 September he made notes in his notebook of the matters that he wished to discuss with Mr Roberts. His notes included his rough calculations of a possible termination package for the Claimant. The figures written were "*330-360 MIN 100 (NOTICE), 115 BONUS, 115 BUYOUT.*" His notes also contained the following,

"In general ...

- *Trust seems gone*
- *What do you expect of me*
- *Repeat what said on June 23 [?] /2012"*

106 During the video conference on 20 September Mr Rossi told Mr Roberts about his ongoing concerns about the Claimant and that he was contemplating terminating her employment. The concerns that he had raised in June of that year were ongoing and the meeting in Lucca had made him realise that things were not likely to improve. Mr Roberts advised him to send the Claimant's PDR to Mr Speak and to seek his advice on how to progress matters. Mr Roberts did not disagree with what Mr Rossi proposed but he did not at that stage authorise the termination of the Claimant's employment.

107 Later that afternoon Mr Rossi spoke to Mr Ellis and sent him copy of the Claimant's PDR. After his conversation with Mr Rossi, Mr Ellis sent the following text message to Mr Speak,

"Hi Andy. Caught up with Stefano. They were aligned on the decision to go ahead with an exit. They were also agreed on the approach for the

replacement. Miles wants to talk to you next Monday and agree the approach and financials. Regards Tim.”

108 On 23 September Mr Rossi sent the Claimant's PDR to Mr Speak.

109 On 25 September R1 delivered a training programme called the Global Leadership Programme. The programme was designed with the Said Business School to develop leaders in the Group. One of the modules covered sales and marketing and some of R1's key customers participated in that. Mr Rossi and the Claimant were responsible for sponsoring that module. Mr Rossi did the only presentation as the Claimant had not prepared one. The Claimant sat at the back of the room using her mobile telephone. In the evening she and Mr Rossi were to jointly host a dinner for the participants. The Claimant said that she could not attend as she had to attend a dinner with an important client that evening. However, she did not attend the dinner with the client and Mr Rossi learnt later that she had eaten alone at the hotel.

110 Mr Rossi was advised to speak to some of the Claimant's direct reports and to record what they said before taking any steps to terminate her employment. On 26 September he spoke to Steve Cooper. Mr Cooper was the leader of a Customer Business Unit and was on the SMI Leadership team. After the meeting Mr Rossi made a brief note of what Mr Cooper had said. Mr Cooper said that the Claimant's style brought confusion as she continuously moved targets according to the latest task on which she was involved. She was frustrated that she did not get the financial support that she sought to grow the organisation according to her plan and that people were afraid of possible consequences if they were not aligned to her will.

111 On 26 September the Claimant sent an email to Messrs Ellis and Brown, which was copied to Mr Rossi, seeking support to recruit for SMI. She said that in the past year she had lost 33 employees, had recruited to 13 of the 20 roles for which approval had been given and that sales had increased and that SMI had taken on additional responsibilities. She said that she wanted to recruit to the remaining 7 roles *“over the back end of the year.”*

112 Mr Rossi was surprised to receive that email a week after he had told the Division how disappointing the results of the first quarter had been and how everyone had to work to improve them by the end of the first half. Mr Rossi asked Time Ellis to help him draft his response. He sent her a response on 1 October. He said,

“As is often the case there is a lot of detail in the attached analysis, however, it does not make it clear on where we stand versus budget...”

As previously discussed, I think it is important that you work closely with your functional colleagues going forward and use these resources to reconcile the number rather than you trying to resolve it yourself, which is not the best use of your time. Your focus must be to continue to work closely with the Packaging Leadership team to deliver our Divisional Budget commitments and build an aligned SMI organisation across the full Division. There is still much work to do in this area.”

113 The Claimant responded,

“...The real issue here is I don’t need my colleagues trying to tell me I have a budget problem when I don’t. And I would rather not have to spend time explaining why not, but what choice do I have? You’re right – it is not a good use of my time.”

Mr Rossi responded to that by saying,

“In all fairness we do have a Budget problem – as a Division we are far away from our target, so as a member of the Management team I do expect that you share the Budget problem of the Division, like any member of the team. As discussed in the last four months, it is necessary to develop a plan to bring us back towards our Budget expectations, this is valid for all the regions and certainly for all the functions of the Centre – everybody helps, to me it is about delivering the results of the Division, not of a single function.”

114 On 1 October Mr Rossi spoke to Francesco van Westrenen, who was another CBU leader reporting directly to the Claimant, about her and made a note after the meeting. Mr Van Westrenen said that the Claimant had some good ideas but did not have the ability to take people with her and had lost the support of her team and peers. Mr Rossi also spoke to Marco Hilpert, who was a member of a CBU for a particular key account. He said that the Claimant had suggested that he stop his mentoring activities with Paul Brown.

115 On 8 October Mr Rossi spoke to Miles Roberts about the Claimant. He said that he thought that the Claimant’s relationship with the rest of the organisation was adversely affecting the Packaging management team and he could not let it continue any longer. He said that he was considering offering the role to Marc Chiron. Mr Rossi wanted the role filled immediately if the Claimant left because it was an important role. He did not want to recruit externally, not only because it took time, but also because it was costly and there was a certain degree of uncertainty whether you could find the right person. He said that Mr Chiron was someone who fought his corner strongly but, after a thorough discussion, was prepared to accept decisions that did not accord with his views. He also thought that as he came from the Regions he would have a better working relationship with them than the Claimant. Mr Rossi’s view was that although he was not yet the finished article he frequently exceeded expectation in his current role.

116 On 9 October Wim Wouters (Creative Director of R1’s internal design agency) approached Mr Rossi and spoke to him. He was upset because he had been told on 4 October by the Claimant’s direct reports that his team was going to be dismantled and he had not been consulted about it. He tried to speak to the Claimant and told her that he did not think that his team would be effective if it was split up. Mr Wouters told Mr Rossi about the Claimant’s decision about his team and why he thought that it would be counter-productive for both R1 and its customers. He said that it was impossible to have a conversation with the Claimant because she did not listen to anyone else’s views and that people were fearful of the consequences if they did not agree with her views. Following the meeting Mr Rossi asked the Claimant what her plans were for Mr Wouters’ creative team and expressed his view that he thought that it was better not to split the team until they had a clear idea of how they could best be used.

117 Mr Ellis advised Mr Rossi to prepare a document in tabular form setting out his concerns about the Claimant. On 10 October Mr Rossi sent him a draft of the first part of the document to get his view on the style. The document was divided into three parts which were headed “Business Aspects”, “Loyalty to the team and business ethic” and “sentiment of the organisation”. Under each heading he listed the most recent issues, i.e. those which had come up since 25 September. Mr Ellis informed MR Rossi that he and Louise Bentham would refine “the exit proposal” and get back to him with it.

118 On 11 October Mr Roberts sent an email to Mr Speak in which he said,

*“I am aware there are some significant performance/behavioural issues with Adrienne.
If these cannot be resolved satisfactorily, there may be a parting of the ways.
Would you advise me on the costs of a termination that is performance/behaviour related.”*

119 Louise Bentham provided him with the figures and various options the same day. She said that in respect of the bonus and PSP awards the starting position was that they were forfeited if the discretion was not applied to grant good leaver treatment. As far as the joining award was concerned she said that it had been made clear that it would lapse if the individual was serving notice or had left R1 before the vesting date for any reason. The intention had been not to offer good leaver status although discretion could be exercised to do so on a time pro-rata basis.

120 On 15 October Mr Rossi asked Marc Chiron whether he would be interested in the Claimant’s role. Mr Chiron said that he would consider it but would only be interested in taking on the role on a temporary basis as his ambition was to manage the profit and loss of a region or cluster of sites. On 22 October he sent Mr Rossi an email in which he said,

*“I’m back to you on your proposal to take over the divisional SMI role for a year before moving to a P&L responsibility (most probably in northern France).
I’m pleased to confirm that I’m ready for this move.”*

He set out what he understood to be the priorities which included the following – to land key projects and initiatives currently in the pipeline, to revitalise the ways of working between division and regions to get support and engagement locally and to sustain growth but tackle hotspots of negative margins by stronger P&L responsibility from CBUs.

121 Liza Strong invited all the women who were in the top 150 roles in the Group for an interview. There were 19 women. One declined to be interviewed. Between 28 August and 20 September Liza Strong interviewed 23 employees (18 women and 5 men) for the gender diversity research. In general, about half the responses were positive and half of them negative. Most of the women interviewed had been able to progress in DSS in a number of ways – expansion of the business had created more opportunities, their roles had grown, they had performed well and their managers had put them forward. There were, however, some concerns about progression. They related to the fact that that roles were often not advertised and it was difficult to find roles outside one’s own function and that roles were sometimes just given to certain individuals. Although some women felt that gender was not an obstacle to

progression, most felt that it was, albeit indirectly and unconsciously. Being in senior roles involved a lot of travel and time away from home. Work-life balance was seen as an issue for all employees. As the senior leadership was almost all male there were also concerns about unconscious bias and stereotypical assumptions being made about men providing strong leadership or women wanting to prioritise family life. About half the female interviewees had not experienced or witnessed inappropriate behaviour, such as discrimination or harassment, related to gender. Of the other half, one had heard “*some biased comments*”, one had heard “*a few off colour comments*” and one had heard “*bad language, male jokes*”. There was one comment about people forgetting that the interviewee was a woman, one comment about the leadership being uncomfortable with women pushing back and one woman said that she needed more effort to justify her opinions, there were different ways of describing man and women’s behaviour and men were always asked to do the wrap up speech and to present. About half felt that DSS was an inclusive workplace and the other felt that it was not. When asked what the Group could do to attract and retain women leaders, various suggestions were put forward – articulating the opportunities and support available for women, flexible working, better life-work balance and less travelling, better maternity provision, job sharing, clear career planning and support, mentoring, coaching and having more senior female leaders.

122 On 20 October Liza Strong sent to Jacky Wearn a draft of the outcome of her gender diversity research. The Executive Summary noted the following points – Eastern bloc countries had stronger diversity and equality than Western European countries, IT, HR and Finance had stronger diversity and equality, visible lack of diversity at GOC level had been unanimously noted, manufacturing industry had inherent gender challenges but these were not insurmountable, there were varied responses on inappropriate behaviour and banter, generally DSS was not viewed an inclusive organisation, there were not many female role models, results and delivery orientation were seen as the key requirements to get ahead in DSS, there was a lack of career development support and unconscious bias had been identified by men and women.

123 At a trading meeting on 24 October 2018 Miles Roberts told the whole team that they needed to improve and told the Claimant that the profitability of her team was substandard. A few days after the meeting the Claimant sent her team an email in which she said,

“I came under some severe heat this last month at the trading meeting concerning our collective sales effectiveness...”

We had some discussion as to why we have only trained half our sales force to date on The Way We Sell, and what is required to complete this as mandatory and follow up with performance measures.

We need to sharpen our thinking on sales effectiveness and how we own this programme...”

124 On 26 October Mr Roberts had a video conference call with Mr Rossi. Mr Rossi confirmed that he wanted to terminate the Claimant’s employment. He said that he had spoken to Marc Chiron who had confirmed that he would accept the role. They had a discussion about Mr Chiron’s suitability for the role and Mr Rossi persuaded Mr Roberts that he was a good choice although he had not previously had a central role and his ambition was to manage a cluster of production sites. Mr Roberts authorised the decision to dismiss the Claimant and to appoint Mr Chiron to the role.

125 On 27 October Mr Speak sent Mr Roberts the figures to be used in calculating the Claimant's termination package and his recommendations. He said that the six months' notice period was worth £102,000, subject to mitigation; the full value of the short and long-term incentives (if granted good leaver status) was also worth £102,000; the extraordinary joining award was worth £90,000 but was discretionary because the wording was that if the Claimant was not employed after two years she would forfeit it. He recommended that they should not confirm good leaver status as he thought that there was an important principle as the Claimant "*had contributed to her own downfall.*" He suggested an opening offer of pay in lieu of notice plus £50,000 with the possibility of that going up to £75,000 or, exceptionally, £100,000. Mr Roberts' response was to go for notice, subject to mitigation, plus £50,000. Mr Speak agreed that they would try that and said that he would "*coach*" Mr Rossi on the content of the PDR and how to handle the offer of a settlement. Mr Roberts added that he thought that their offer was fair and it was, therefore, a maximum.

126 On 1 November Ms Wearn circulated the draft anonymised gender diversity report to the HR Leadership Team.

127 On 5 November Mr Ellis informed Mr Speak that he and Mr Rossi would be meeting with the Claimant the following day to inform her that she needed to leave the business because of the concerns that had been discussed with her about her leadership style and not taking a collaborative approach with her team and the management team. The Claimant was due to attend a half-year PDR meeting with Mr Rossi on 6 November. She had been told that it would be an informal chat to go over her current objectives and to see how things were going.

128 The Claimant attended the meeting with Mr Rossi on 6 November and was surprised to see Mr Ellis there. She had not been given any warning that the meeting was to discuss the termination of her employment. Mr Rossi explained that Mr Ellis was present because of the nature of the conversation that he wanted to have with her. He said that he did not think what he had to say would come as a complete surprise to her. Mr Rossi said that while he recognised that the Claimant had strong technical skills, things were not working out for the reasons that he had previously raised with her in her PDR. She was not working collaboratively with the Regional teams and was not taking a collegiate approach with the Management team and her own team. She was not taking people along with her. They needed to have a solid team that worked in harmony and that was not happening. They needed a different leadership style.

129 Mr Ellis said that performance management was rarely appropriate at a senior level. There were two options. They could dismiss her and pay her her contractual notice subject to mitigation. That, however, was not their preferred option. Their preference was to reach a mutual agreement on termination. Their offer for a settlement was six months' notice pay plus £50,000 on top. That sum was not negotiable.

130 The Claimant said that she did not accept that how she managed was an acceptable reason for falling short of what was required in the role. She wanted to know who had given feedback that her performance/behaviour was not acceptable and wanted to challenge her accusers. She asked why, if she was not performing, she had been asked to present at the Capital Markets day. She said that a settlement

agreement based on £50,000 on top of her contractual pay was not acceptable and she would need two years' salary. She accused the company of sexism and referred to another senior woman who had recently left the business. She threatened to take R1 to court and to go to the press.

131 At the end of the meeting Mr Rossi and Mr Ellis confirmed that the reason for taking the decision was things could not go on as they were, she would be on leave for one week and her team would be told that she was on leave for personal reasons. She should advise Mr Ellis of her solicitor's contact details and a draft settlement agreement would be provided. The settlement agreement would need to be concluded by 13 November, failing which the company would dismiss her.

132 The Claimant did not enter into any further discussions about the settlement agreement. She saw no point in doing so as she had been told that it was not negotiable. On 14 November Mr Rossi wrote to the Claimant terminating her employment. He said,

"As discussed, the reason for the decision is due to concerns about your leadership style and not taking a collaborative approach with your team, regional MDs or the PMT, which is vital to driving strategy.

At the last full-year PDR these concerns were raised with you and it was made clear that things had to change. However, things have not changed and we do not believe that they would change."

She was told that her employment was terminated with immediate effect and she would be paid in lieu of notice and any accrued but untaken holiday.

133 Solicitors acting on behalf of the Claimant appealed against her dismissal on 20 November. They said,

"She considers her sudden dismissal from the Company was unfair. She disputes the genuineness of the reasons set out in the second and third paragraphs of the Letter, and does not accept that these were communicated to her previously. She considers the real reason behind her termination of employment was sex, and that this protected characteristic has disadvantaged her in several key respects culminating in her unlawful dismissal by the Company."

134 The Claimant subsequently provided more detailed grounds of appeal. She said that she believed that she had been dismissed because she was a woman and because she had raised concerns in the gender diversity survey about sexist and other discriminatory behaviour and assumptions at DSS.

135 On 22 November Mr Rossi announced that Marc Chiron had been appointed SMI Director and would commence in that role on 1 December 2018.

136 The Claimant's appeal was considered by Iain Simm, Group General Counsel and Company Secretary. He met with the Claimant, who was accompanied by her solicitor, on 14 December 2018 and obtained written responses to questions from Messrs Rossi and Ellis and Ms Wearn. An investigation report, compiled by Mark Dias (the Group's HR Director) was shared with the Claimant. She commented on

the report. Following her response, Mr Simm asked Mr Ellis some more questions and asked Siobhan Cassone to interview the employees who Mr Rossi had said had complained to him about the claimant. Ms Cassone interviewed Messrs van Westrenen, Wouters and Hilpert and they gave a similar account to the conversations that Mr Rossi had recorded with them.

137 On 11 February 2019 Mr Simm sent the Claimant his decision. He said that having considered all the evidence he did not believe that the Claimant had been dismissed because she was a woman or because she raised concerns about sexist and other discriminatory behaviour and assumptions at DS Smith. The evidence supported the reason for the dismissal being concerns related to her performance, in particular her leadership style. He found it compelling that the concerns that led Mr Rossi to dismiss her were shared by others. There was no evidence to support a connection between what she had said in the gender diversity and her dismissal. He found it compelling that Ms Wearn had confirmed Mr Rossi's statement that he had not known what the Claimant had said in her interview when he took the decision to dismiss her. Mr Simm did not uphold the Claimant's appeal.

Other employees whose employment was terminated

138 The manner in which the Claimant's employment was terminated (the failure to go through a process and to offer the employee the choice of a settlement agreement or dismissal) was not unusual for senior roles at DS Smith. We set out below details of some male employees whose employment was terminated in a similar manner. Their names have been anonymised.

M1

139 M1's employment with R1 started in 2009 and in 2014 he was appointed Regional MD. In his 2015 PDR Mr Rossi noted that although he had prepared an ambitious plan, he needed to focus on delivering the plan as execution was key. He also advised him to spend more time with his people and to engage and interact with them. His 2016 PDR noted many strengths and identified his weaknesses as sometimes being too impatient and demanding and having too little focus on driving the organisation capability forward. In 2016 his talent rating was B5.

140 In 2017 he did not achieve some of his objectives and his performance rating was that he had not met expectations. He was given a talent rating of C2. At that stage Mr Rossi decided to move him to a different role. M1 was very unhappy about losing his position. His appointment to the new role was announced in July 2017.

141 However, Mr Rossi was not satisfied in his performance in the new role and in March 2018 the decision was made to terminate his employment. Mr Rossi and Mr Ellis met with him on 26 March 2018. He was not given the option of accepting a settlement agreement at that meeting because in the jurisdiction where he worked the employee needed to bring a claim before a settlement agreement could be reached. M1 was told at the meeting that his employment was being terminated and he was told to seek legal advice. His employment was terminated on 26 March 2018 with 12 months' notice. He was placed on garden leave during the notice period. He then submitted a claim against R1 so that he could enter into negotiations with them.

142 The settlement agreement provided that he would be paid his salary until the expiry of the notice period (unless he terminated his employment before the expiry of the notice). In addition to that it was agreed that he would be paid a cash bonus of 68,886 euros. It was agreed that the PSP and DBSP award for 2015 would vest (as they were to vest on dates before his employment terminated) but that no awards for the years 2016-2019 would vest.

M2

143 When his employment was terminated M2 had 24 years' service with the Group. Mr Rossi became his manager in 2014. His view was that while M2 had remarkable skills in understanding the business he did not have the leadership skill to run it, particularly as the business was growing. In February 2015 Mr Rossi asked him to step down into a lesser role which he thought was more suited to him. It was a role within R1's Leadership and Management Teams. In 2015 he was given a talent rating of B5.

144 In 2017 he was given a talent rating of B4 and it was noted that he "*will need to develop strengths for effective people management as this is an obvious weak area.*" Mr Rossi did not complete his PDF for 2017 but had discussions with him about his performance.

145 In November 2017, when the Claimant's role expanded to take on Innovation, M2, who had been responsible for that function, reported to both her and Mr Rossi. At that stage R1 took the view that it could not justify paying M2 what he was being paid when the role had diminished (his responsibility had been taken over by the Claimant) and he had not been performing previously to the level required in the role.

146 On 23 March Messrs Rossi and Ellis met with him and informed him that his role was at risk of redundancy and he was offered the option to enter into a settlement agreement.

147 On 29 March M2 and DS Smith signed a settlement agreement. It was agreed that M2 would serve one month of his six months' notice on garden leave and that his employment would terminate on 30 April 2018. It was agreed that he would be paid a redundancy payment of £155,402 and five months' pay in lieu of notice in the sum of £84,176.25. It was also agreed that as the reason for dismissal was redundancy, he would be treated as a good leaver and would be paid the bonus award and the PSP and DSBP awards.

M3

148 M3 joined R1 in May 2000. In his 2015 PDR Mr Rossi recorded his strengths as follows,

"... has cumulated solid experience, he is a bright individual who understand the UK market very well; he is creative and has good idea generation – he shows a good understanding and feeling for the source of revenue in the business."

In identifying the areas for improvement he said,

“... should improve his structure in approaching the business and make himself more visible and available to the organisation; good idea generation but should definitely improve the ability to follow-up and drive implementation more effectively.” And

“You count on the knowledge of the dynamic of this business and a bright intelligence, what you have to grow is the level of personal engagement.”

149 In September 2015 Mr Rossi said to M3,

“My idea of running the business does not count on big central resources but rather in building solid networking and relation with the regions, where the business is effectively happening.”

Mr Rossi discussed M3’s unsuitability in his role with Miles Roberts. Mr Roberts said that M3 had been very successful in his previous role and he wanted to see if he could move him to a similar role to retain his skillset. He was moved into a temporary Group role until a new position was identified. However, it took longer than anticipated and in early 2017 it was decided to exit M3 from the business.

150 Mr Roberts and the Group HR Director at the time met with M3 in November 2016 and informed him of the decision to terminate his employment. He was placed on garden leave during his six months’ notice period. He was given the option of entering into a settlement agreement and he did so. The agreement was signed on 10 March 2017. It provided that his employment would terminate on 31 May 2017 by reason of redundancy. Under the agreement DS Smith waived the requirement that the employee must not be under notice at the usual time of payment to receive a bonus award and instead agreed to pay a bonus award on a time pro-rata basis based on the seven months of the financial year that he had worked prior to being placed on garden leave. It was agreed that he would be paid an enhanced redundancy payment of £145,285 and an ex gratia payment of £60,000, and as the reason for the termination was redundancy, the PSP and DBSP awards would vest, subject to a pro-rata calculation for uninvested awards based on the relevant period of time ending on the date that he commenced garden leave.

M4

151 M4 worked for R1 for 24 years. In 2015 he was a Regional MD and reported to Mr Rossi. In his 2016 PDR Mr Rossi said,

“Another important business year for the ... Region under the leadership of [M4] – the region is leading the development of the Packaging Division, providing exemplary business practices and supportive attitude by all individuals.

The ... Region is reflecting the personality of [M4] very competent on the business subjects, good commercial acumen, passionate about the job and eager to learn and improve.

[M4] has very high potential and quite rightly the expectations on him are very high – individuals with high ambition and potential are due to perform always at different pace than the other and this is exactly where [M4] stands; it is

challenging for him but the Division, Group and myself personally have high expectations from him – his “meeting expectations” for many other individual would be worth more in relative terms, but his potential suggests higher expectations from him.”

He was given a talent rating of A9 in 2016.

152 In early 2017 Mr Rossi was considering which Regional MDs would be allocated the MD roles in the newly created larger regions. He had discussions with M4 about him taking over the Regional MD role for the new East Europe region. M4 agreed to take over the role if his salary and bonus were increased. On 14 April 2020 Mr Rossi told him that he needed to get the final sign-off from Mr Roberts for the package that they had discussed. He also said in the same email that the forecast for M4’s region had been reduced again and that that had already caused “*a lot of reactions.*”

153 In early May Mr Rossi informed M4 that he was still waiting to get the “green light” from Mr Roberts. He said that if the Region could go over the forecast, that would obviously help. On 12 May M4 provided the results for his region. He said that he realised that they had not delivered on the budget promise for the year and he was disappointed. He continued,

“What I would like to discuss is where we are with the role changes we have discussed – I sense very strongly that Miles has a problem with me hence the delay. I have been waiting for the relocation document and formal offer letter for some time now – and can only assume that this delay is due to a problem. I would just like a straight answer – and what route we take to resolve this.”

154 On 17 May Mr Rossi met with M4 and suspended him. He said that the business had serious concerns relating to his ability to deliver budgeted/forecasted results, and that that would be investigated as a potential disciplinary matter. He was given the option of accepting a settlement agreement or his employment being terminated. He chose the former. While the settlement terms were being discussed, he was given a talent rating of C1.

155 The settlement agreement was concluded on 1 June 2017. It was agreed that he would serve his notice on garden leave from 30 May to 30 November 2017 when his employment would terminate, and that he would be paid his normal salary with all benefits until then. Following the termination of his employment he would receive an ex gratia payment of £180,000, in two installments of £90,000. He would not receive any bonus payment for 2016-2017. It was agreed that he would receive the 2014 PSP awards that would vest on 30 July 2017, but the PSP awards for 2015 and 2016 would lapse immediately.

M6

156 M6 joined DS Smith in September 2017 and had a Group leadership role. He reported to Miles Roberts. In his mid-year review in October 2018 Mr Roberts told him that he needed “*to be more impactful with his peers/in company during meetings.*” Mr Roberts remained dissatisfied with his performance. He met with M4 on 1 March 2019 and told him that his employment was to be terminated with notice. He would be expected to work three months of his notice period and would be paid in

lieu of the remaining three months. That was confirmed in a letter of the same date. He was also given the option of entering into a settlement agreement.

157 For his 2018-2019 PDR Mr Roberts' overall evaluation was "*overall performance needs improvement by better communication/working with parties.*"

158 M6 entered into negotiations and a settlement agreement was signed on 21 May 2019. It was agreed that his employment would terminate on 30 August 2019 and that he would be on garden leave from 1 July 2019. It was also agreed that the company would recommend to the Remuneration Committee that the PSP joining award of October 2017, the 2017 DSBP award and the bonus award for 2018-2019 should not lapse on termination.

The Claimant's comparators

Marc Chiron

159 Mr Chiron has worked for the Group for 12 years in a number of sales and marketing roles. From 2014 he was the Sales Marketing and Innovation ("SMI") Director for France and reported to Thibault Laumonier in that role.

160 In his 2016-2017 appraisal both his overall performance and leadership competency ratings were "exceeds expectations". His manager's comments were,

"An exceptional great performance on all fronts, congratulations. The French business is progressing with a tight grip on its sales, marketing and innovation agenda. While keeping this solid drive in the future, the organizational side will need to be further developed, depending as usual on resources constraints and controlling costs. Excellent work together in perfect alignment."

161 In his 2017-2018 appraisal his overall performance rating was "exceeds expectations" while his overall leadership competency rating was "meets expectations". His manager's comments were,

"The Regional SMI leader role is broad and complex with significant challenges on almost all fronts, the Recovery and Systems being among the most difficult. Marc has shown a strong ability to face these challenges efficiently with a quick engagement into Systems agenda. Marc's availability and flexibility makes him a critical leader to support the regional performance."

At the talent calibration meeting in 2018 Marc Chiron was rated A8. Many positive comments were made about him (mainly by his line manager). There were some negative comments, mostly by the Claimant (see paragraph 63 above).

162 In 2018 Mr Chiron was selected for the Global Leadership Programme. As part of that an Emotional and Social Competency Inventory ("ESCI") feedback report was prepared on him by Korn Ferry on 25 April 2018. Sixteen colleagues provided feedback. They comprised his manager, peers, those he led and others. They scored Mr Chiron on twelve competencies. These scores could range from 1 to 5. Their total scores on eleven competencies were between 4 and 5. One was 3.9. Mr Chiron received high scores from his manager and those he led. Almost all their scores were between 4 and 5. In five out of the twelve competencies, he received ratings from his

peers that were below the norm (between 3 and 4). Verbatim comments demonstrating strengths and improvement were quoted. Most of what was said was very positive. The improvement areas were mainly around his style of communication, which was seen as being too direct, and not always showing enough empathy. Overall, it was a very positive report.

Thomas Kure Jakobsen

163 In 2016 he was Regional MD for Northern Europe and his talent grid score was A6. The talent profile card noted that he had “*very high potential (capable of 2+ promotions within 3-5 years).*”

164 In his 2016-2017 PDR his overall performance rating was “meets expectations” and his overall leadership competency rating was “exceeds expectations”. Mr Rossi’s comments on 31 March 2017 were,

“Thomas is keeps on developing his skills. His presence is becoming more relevant in the agenda of the Division and his specific strong commercial skills are recognised and widely appreciated. I expect him to deliver on expectation and grow his management position in the country over the next few years.”

His talent grid rating in 2017 was A6.

165 In summer 2017 when the number of regions was reduced, Mr Jakobsen’s region was expanded to include the UK.

166 In his PDR meeting with Mr Roberts on 18 April 2018, Mr Rossi said about Mr Jakobsen,

“Thomas has great potential, but not sure he will make it due to maturity. A bit of anarchy in him, doesn’t put his strong skills in business understanding into clear action plans. Need to help him understand this and how to deal with it, if he wants greater respectability.”

167 In May 2018 Mr Jakobsen lost his temper at a PLT meeting. He apologised to the Claimant afterwards (see paragraph 59 above).

168 His 2017-2018 PDR was completed over several meetings with Mr Rossi. His overall ratings for both performance and leadership were “meets expectations”. Mr Rossi noted that he had progressed rapidly within DSS and needed to consolidate his team to ensure sustained delivery of results. He said,

“Thomas has improved his impact on the organisation overtime; still, I expect more because I sense that there is more potential to unlock – he could deliver more and still sometime struggle to show his clear leadership skills. He has clearly the ability to make a change, like shown with the implementation of the changes in the UK, but need to follow the delivery of the results through the very end – as per feedback given in several occasions, also his attitude in meetings and specific situations could largely improve, to help him managing better the delivery of his messages. To support Thomas in his development journey we have started a senior leadership development programme with

Korn Ferry and he should treasure this opportunity to raise the bar of his managerial performance. I will follow-up closely the development.”

Mr Rossi proposed a talent rating of B5 for him in 2018.

169 In summer of 2018 R1 was proposing to reduce the number of regions to three. It was anticipated that the new North Region would comprise the Nordic countries and the UK (managed by Mr Jakobsen) plus Benelux, Switzerland and Germany. In an email to Mr Roberts on 15 June 2018 about the new structure Mr Rossi said,

“I repeat what I have told you many times, Thomas has a great potential but unfortunately I’m not convinced he has the right attitude to express it. So, if we agree on the set-up of the North Region, at this stage I’m not prepared to give the large role to him.

...

NOTE: when we do not give the larger role to Thomas, I think would be wrong to have him reporting to the new MD – therefore we have to find a new role for him or there is a decision to take.”

170 At the GOC talent calibration meeting/review of 21 June 2018 the rating of B5 was confirmed. The two future options considered for Mr Jakobsen were whether he could take over the Eastern Europe region or drive the expansion of the Division in the USA under someone else. It was suggested that a 360 feedback be run as part of his coaching programme.

171 Following the expansion of the regions, Mr Jakobsen was offered the opportunity to expand R1 in the USA and he accepted that.

Thibault Laumonier

172 Mr Laumonier has worked for R1 for eight years and has been the Regional MD for France for six years. Prior to October 2018, he reported to Mr Rossi. When the number of regions was reduced to three, and France became part of the South Region (along with Spain, Portugal and Italy) he started reporting to Jordi Cazorla, who was appointed MD of the enlarged region.

173 In 2016 he was given a talent rating of B4. Mr Rossi noted, *“Little capacity for further promotion. Potential to take further responsibilities.”*

174 His performance rating for 2016-2017 was “meets expectations” and his talent rating was “beyond role”. He was given a talent rating of B5.

175 In his 2017-2018 PDR Mr Laumonier’s ratings for both performance and leadership competency were “meets expectations”. Mr Rossi commented,

“The year just passed has not been easy indeed, with multiple increase of paper price and the relative need to continuously recover the cost via the selling price of our finished products... The operational issues have clearly impacted the results of the Region, possibly creating a longer lasting problem – still, the issues seem rather concentrated in few well identified sites, suggesting that we need to address individual performance in stronger manner and make a better use of our footprint. That is exactly what I expect in

this new Financial Year – address strongly the people and operational agenda. On a more personal note, the professionalism and constructive behaviour of Thibault is widely appreciated by the management and all other Regional colleagues.”

176 He was given a talent score of B4 in June 2018. Mr Rossi noted that he was “*probably at his level running a large business like France*” and that involvement in Division wide projects would help him develop as a business leader.

Herve Colleaux

177 Herve Colleaux joined R1 in June 2012 and was the Sales and Marketing Director from 1 February 2015 to October 2016. That role developed later into the role to which the Claimant was appointed. Mr Colleaux’ role had a narrower remit than the SMI Director role and the salary was considerably lower. Mr Colleaux was given a talent rating of B4 in 2016. As R1 expanded rapidly, management realised that they needed someone with more advanced sales and marketing skills than Mr Colleaux had and decided to recruit to the role and to replace Mr Colleaux. An opportunity arose for a Managing Director in Paper Sourcing, which Mr Rossi believed suited Mr Colleaux’s skills. He was offered that role and accepted it in 2016.

178 In his 2017-2018 PDR his line manager gave him a performance rating of “below expectations” and a leadership competency rating of “meets expectations”. His line manager noted that Mr Colleaux had put a huge amount of hard work into his performance but had underachieved against key objectives. He said that in the coming year “*some fundamental performance indicators need to turn in the right direction.*” In June 2018 he was given a talent rating of C1.

179 In his 2018-2019 PDR his line manager’s overall rating was “meets expectations” and he said,

“Overall I am pleased with Herve’s performance in the last financial year, as he should be. We spoke at length through the year about the need for improvement and how he should go about this. Herve’s response has been excellent which has culminated in him achieving most of his objectives and making progress in all – very well done.”

Philip Bautil

180 Philip Bautil was Regional MD of Benelux from January 2015. From June 2017 to March 2018, in addition to that role, he was also Managing Director of Industrial Packaging Solutions.

181 In 2016 he was given a talent score of A6 and Mr Rossi noted that he had “*very high potential (capable of 2+ promotions within 3-5 years)*”.

182 In 2017 he was given an overall performance rating of “exceeds expectations” and a talent grid score of A8.

183 Shortly before April 2018 Mr Bautil was appointed Regional MD of the new Central Europe Region (comprising Benelux and Germany). In his 2017-2018 PDR

his performance rating was “exceeds expectations” and his leadership competency rating was “meets expectations”. Mr Rossi’s comments were,

“Work ethics of Philip are a strong asset for the Division: open, transparent and a real team player. Knowledge of the business is his strong characteristic, expressed with hands on management style – with the new assignment will be important to develop an effective approach to manage from distance.”

He was given a talent score of B5 and it was noted of him at the talent calibration meeting on 21 June 2018,

“Very resilient corporate resource. Not a succession candidate for Stefano but can do more. Tendency to get into the detail, needs to balance strategic/operational and empower his team. Bear him in mind as we explore JV/Asia relationships.”

184 It was subsequently decided that Mr Bautil would return to managing only Benelux, although he continued managing the larger region until at least the end of 2019.

Conclusions

Direct sex discrimination

185 In considering the complaint of direct sex discrimination we considered the following two questions:

- (a) Were the reasons given by the Respondents for dismissing the Claimant (her leadership style i.e. not working collaboratively with the Regional MDs and others in the Leadership team, apportioning blame when things went wrong rather than working together to resolve the problem, not recognising and working within the budget constraints of R1) the real reasons for her dismissal? If not, was the real reason for the dismissal, in whole or in part, her gender;
- (b) If the reasons given were the real reasons whether, in dismissing her for those reasons, the Respondents treated her less favourably than they treated, or would have treated, men, in similar circumstances and whether the Claimant’s sex was a reason for that less favourable treatment.

186 In considering both those issues we took into account the following facts. Although it is common for the manufacturing industry to be male dominated and it is accepted that male engineering graduates significantly outnumber female engineering graduates in many countries, the extent of the lack of gender diversity at the senior levels of DS Smith is unacceptable and needs to be addressed. During the Claimant’s period of employment there were no women on the Group Operating Committee or on the Executive. 9 out of the 54 roles at the next level down, were filled by women. The Claimant was one of them and six were in HR and Legal functions. Within the top 150 employees, 19 were women. Most of those 19 women felt that gender was an obstacle to progression at DS Smith, albeit indirectly and

unconsciously. They had concerns about unconscious bias and stereotypical assumptions. About half of them felt that DS Smith was not an inclusive workplace and had experienced or witnessed inappropriate behaviour (see paragraph 121 above). The Claimant had been referred to as a “girlie” and “little lady” and had been winked at. The Claimant was the only woman in R1’s Leadership team.

187 That having been said, the individuals involved in the dismissal of the Claimant were the same individuals who had been involved in recruiting her. Mr Rossi played a crucial part in making both decisions. They interviewed both male and female candidates and they all agreed that the Claimant was the one who should be appointed. That was in spite of the fact that she had less experience in sales than in marketing and the comments in her psychological profile about her style and the adjustments that might be required because she was coming from a very large organisation. R1 offered her a competitive and lucrative package because it was very keen to recruit her.

188 In considering whether the reasons given to the Claimant for her dismissal were the true reasons, we also thought it significant that those reasons did not suddenly emerge out of the blue in November 2018. The same concerns about her leadership style – not working collaboratively with the Regional MDs and others in the Leadership team, apportioning blame when things went wrong rather than working together to resolve the problem, not recognising and working within the budget constraints of R1 – had been raised throughout the Claimant’s employment. The importance of the relationship with the regions and the need to work within budget constraints had been made clear in the job description (see paragraph 24 above) and at the meeting she had with Mr Rossi at the start of her employment (see paragraph 31 above).

189 Mr Rossi first raised concerns about the Claimant not working collaboratively and not recognising the budget constraints in July 2017, a little over three months after she started working for R1 (see paragraphs 37-38 above). Some of these were passed on to her by Mr Brown at the meeting on 19 July 2017 (see paragraph 39 above). In September 2017 Mr Cazorla made it clear to the Claimant that he thought that she had acted in an unacceptable manner and that he was concerned about how the central team worked with the local teams (see paragraph 41 above). On 15 February 2018 Mr Rossi only approved recruitment to some of the roles in the Claimant’s new structure because of budget constraints and had a discussion with her about the need to improve the Management Team dynamic (see paragraph 48 above). In March or April 2018 Mr Rossi spoke to the Claimant and Mr Grantham about the need to work more collaboratively (see paragraph 50 xx above). On 18 April Mr Rossi discussed the same concerns about the Claimant with Mr Roberts (see paragraph 51 above). On 25 April Mr Rossi told the Claimant that she needed to develop SMI strategy within the budget that was available and not blame shortcomings on the budget restraints (see paragraph 55 above). On 30 April Mr Rossi told the Claimant that she did not work in a collaborative way with her colleagues (see paragraph 56 above). On 12 June Mr Rossi told the Claimant that Mr Bault had felt unable to raise his concerns about a number of matter with her because of her reaction on previous occasions when he had raised similar concerns

(see paragraph 64 above), Mr Rossi raised similar concerns about the Claimant again with Mr Roberts in his email of 13 June 2018 and discussed them with him at a meeting the following day (see paragraph 65 above). Mr Rossi repeated the same concerns in a document prepared for the GOC talent calibration meeting on 21 June (see paragraph 69 above). Mr Rossi made similar points in the Claimant's PDR which he sent to her on 13 July 2018 (see paragraph 76 above). On 23 August Mr Brown raised concerns with Mr Rossi about the Claimant ignoring the reality of the budget in wanting to recruit to more roles in her team (see paragraph 83 above). On 5 September 2018 the Claimant upset Regional MDs at the meeting in Lucca (see paragraph 89 above). On 6 September Mr Rossi told her that her approach at the meeting the previous day had been inappropriate (see paragraph 93 above). Mr Rossi had repeatedly raised the same concerns about the Claimant with her and others over a period of 14 months. By 20 September 2018 he had decided that things were not working out and the Claimant's employment had to be terminated. Mr Roberts told him to seek advice before he communicated his decision to the Claimant. Having taken into account all the matters at paragraphs 186-189 above we concluded that the reasons given for the Claimant's dismissal were the real reasons for her dismissal.

190 We then considered whether, in dismissing her for those reasons, the Respondents treated her less favourably than they treated, or would have treated, men, in similar circumstances and whether the Claimant's sex was the reason, or part of the reason, for that less favourable treatment. We concluded that none of the comparators relied upon by the Claimant were appropriate comparators because there were material differences between her circumstances and theirs. They had all worked in different roles from the Claimant's role, they had all worked for R1 considerably longer than the Claimant, they had worked to a high standard for many years and Mr Rossi or their manager had not repeatedly raised the same concerns about them as Mr Rossi had raised about the Claimant. That is not to say that at no stage were any concerns or development needs identified, but that in itself is not sufficient to make them appropriate comparators. We summarise below the position in relation to each of them.

191 In 2018 Mr Chiron had been with the Group for twelve years. He was at the level below the Claimant in one of the regions. He had excellent appraisals in 2017 and 2018 and a rating of A8 (high performer with potential) In May 2018. His manager said many positive things about him at that meeting. There were some negative comments and most of them came from the Claimant. Because he was seen as a potential talent he was put on the Global Leadership programme. He received positive feedback on the ESCI feedback report in April 2018 although his style of communication was identified as something that could be improved. His circumstances were very different from those of the Claimant.

192 In 2018 Mr Jakobsen had been employed by R1 for over four years. He progressed from being Regional MD for Denmark to being Regional MD for Northern Europe which was subsequently expanded to include the UK. He received a very good appraisal in 2017 and talent grid ratings of A6 (good performer with high potential) for 2016 and 2017. In his 2018 appraisal he was given ratings of "meets expectations" and a talent grid rating of B5. Mr Rossi recognised that he had the potential to deliver more but felt that he would be better at delivering his message at meetings if he improved his attitude at meetings. Therefore, when R1 decided to

expand his region even further, Mr Rossi felt that he was not the right person to be given the larger role and that it would not be right for him to report into that larger role. If another suitable role for him could not be identified R1 would have to consider terminating his employment. However, another suitable role was identified and Mr Jakobsen accepted that.

193 By 2018 Mr Laumonier had worked for R1 for eight years and had been Regional MD of France for six of those years. He was generally recognised as a good performer but as someone who had progressed as far as he could. His talent grid ratings were B4 for 2016, B5 in 2017 and B4 in 2018. When France became part of a larger region, it was recognised that he was not the right person to take over the larger region. He was not demoted, he was simply not promoted to the larger role. He continued in his role. His 2018 PDR ratings were “meets expectations” and it noted that there had been operational reasons that had impacted the results of the region. It was also noted that his professionalism and constructive behaviour were widely appreciated by management and his regional colleagues.

194 By 2018 Mr Colleux had been working for the Group for six years. He had been in the role that was the precursor to the Claimant’s role for about 18 months. When the role expanded, it was recognised that he was not the right person for it. An opportunity arose in Paper Sourcing and he was offered and accepted that in 2016. In his 2018 PDR he was rated as “below expectations” because although he had put in a lot of hard work he had underachieved against key objectives. It was made clear that there would have to be substantial improvement in the following year. He was given a talent grid rating of C1. In the following year he acted on his manager’s advice about what he should do to improve his performance and as a result made progress and achieved most of his objectives. He was given a rating of “meets expectations” and his manager said that he was very pleased with his performance.

195 Mr Bautil started as Regional MD of Benelux in January 2015 and in April 2018 he was appointed Regional MD of a larger region comprising Benelux and Germany. For the period between June 2017 and March 2018 he also held another role – MD of Industrial Packaging Solutions. In 2017 and 2018 his performance ratings in his PDR were “exceeds expectations”. His talent grid ratings were A6 in 2016, A8 in 2017 and B5 in 2018. Very positive comments were made about him in his PDRs and at the talent calibration meetings. No concerns were expressed. It was decided in 2019 that the larger role was too big for him and that he should revert to being MD of Benelux.

196 The material circumstances of those individuals were so different from those of the Claimant that they did not provide us any assistance with determining how a hypothetical comparator might have been treated.

197 In considering whether by terminating the Claimant’s employment R1 treated her less favourably than they treated or would have treated a man in similar circumstances, we also took into account the termination of employment of M1, M2, M3, M4 and M6. In all their cases, the method of termination was to invite them to a meeting and to offer the alternatives of accepting a settlement agreement or to be dismissed. No process or procedure was followed. It is clear that that was the way in which the Group approached the termination of employment of senior employees. In terminating the Claimant’s employment without following any due process, DS Smith

did not treat her less favourably than it treated senior male employees in similar circumstances.

198 It is correct that the settlement packages they were offered were not identical but nor were their circumstances. Most notably, their length of service varied considerably. When the Claimant's employment was terminated, she had been employed by R1 for 18 months. M6 was the only male employee who had about same length of service. M1 had 9 years' service when his employment was terminated, M3 17 years' service and M2 and M4 had 24 years' service each. The amounts that they received in addition to their notice period varied from about 69,000 euros to £205,000. In some cases they only received the PSP and DBP awards that vested prior to their dismissal but those that were due to vest thereafter lapsed. In others, they did not. As far as M6 is concerned, it is not clear what he received as we do not know whether the Remuneration Committee accepted the company's recommendations.

199 Having considered all the above we concluded that by dismissing the Claimant for the reasons that they did, and in the way that they did, the Respondents did not treat her less favourably than any actual or hypothetical male comparators and that sex played no part whatsoever in her dismissal. We concluded that the Claimant's dismissal was not an act of direct sex discrimination.

Indirect sex discrimination

200 The Claimant's case is that the PCPs identified by her put women at a disadvantage because of the manner in which the Respondents interpreted or understood those PCPs. Hence, the expectation for senior leaders to have leadership style, a collaborative approach, to behave in a collegiate manner, to contribute to the management team and to communicate effectively did not, per se, put women at a particular disadvantage. What put women at a particular disadvantage was what the Respondents perceived as being the characteristics that demonstrated those qualities. The Claimant's case is that the characteristics that the Respondents believed demonstrated those qualities were attending long dinners after meetings, drinking large quantities of wine and discussing football. The Claimant described it in her evidence as "the practice of banding over food, drink and football". She also said that she felt that Mr Rossi's modus operandi was to connect with his team over wine, dinner and football, and because she did not embrace those things in the way that her male colleagues did, she was perceived by them as not being a team player.

201 We have not found that such a culture existed. We have found that the team had dinners together when they had meetings and that people drank wine with the meals and that occasionally football came up in conversation. There was an expectation that everyone would attend the dinner at the end of the first day. It is also the case that Mr Rossi's PA and the Claimant were the only two women present. We do not find that expecting the managers to socialise outside the meetings was something that put women at a particular disadvantage. We accept that the Claimant did not particularly like attending the dinners and often did not like the food that was available.

202 More importantly, we have not found that Mr Rossi's complaints about the Claimant's leadership style and not working collaboratively with the management team related to her not bonding with them over dinners because she did not drink or discuss football. We have found that his concerns were about how she worked with the Regional MDs and the others in the management team, apportioning blame when things went wrong rather than working together to resolve the problem, not recognising and working within the budget constraints of R1. The way in which the Respondents applied the PCPs set out by the Claimant did not put women at a particular disadvantage. The Respondents did not interpret or apply the PCPs in the way the Claimant alleged that they did.

Employment Judge - Grewal

Date 05/06/2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

08/06/20

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FOR THE TRIBUNAL OFFICE