

IN THE HIGH COURT OF JUSTICE

Claim No: QB-2022-002958

KING'S BENCH DIVISION

NCN: [2024] EWHC 2297 (KB)

BETWEEN:

MS SHIKHA GUPTA

Claimant

-and-

DB GROUP SERVICES LIMITED

Defendant

JUDGMENT

Handed down remotely on 5th September 2024

The background

1. In this matter, the Claimant Ms Gupta claims damages from her previous employer the Defendant, alleging breach of contract in relation to her bonus compensation decision for the financial year ending 2016.
2. The Claimant was employed by the Defendant Bank ("the Bank") in its Non- Core Operations Unit ("NCOU"). The Bank employed the Claimant in a rather unusual position. The Bank was trying to get rid of its high-risk assets. As such the NCOU had been set up to carry out this task with the original anticipation that this unit would deliver by 2020. However, in 2015/2016 a decision was made that the unit would in fact have an accelerated closure at the end of 2016 or early 2017. As said by the Claimant, the paradoxical nature of the task set by the Defendant was that the more successful the Claimant's (and her department's) performance was in achieving the goal, the less significant her role would be along with the rest of the NCOU team going forward. She and the rest of the team were effectively working themselves out of a job.
3. The Claimant was, objectively speaking, well remunerated for her role. In addition to salary, she had in the past always received bonuses. It is her case that she anticipated that she would receive bonuses going forward. It is specifically her case that in the light of the task that she was doing she sought, and was given, assurances by her managers within the Bank that if she performed well and delivered the work asked for, she would receive bonuses. She says she relied upon those assurances.

4. In fact, for the year ending 2016 the Claimant and all others of her seniority and above within the Bank in all divisions received no bonus for their Individual Variable Compensation (IVC). She did receive Group Variable Compensation (GVC); however, this was lower than she had expected. It is the Claimant's case that the Defendant's failure to pay her an appropriate bonus amounted to a breach of her contract.
5. The claim is defended on both legal and factual grounds. It is contended that the Claimant was never given assurances upon which she could rely. Further any decision as to payment of a bonus was entirely within the discretion of the Bank and the decision not to make bonus payment was a valid and appropriate one, taking into consideration relevant considerations. The Defendant therefore contends that this claim is ill- founded and that the Claimant is seeking to have herself treated in a special category over and above all of the other employees of the Bank who did not receive a 2016 bonus.
6. Within this judgment I will refer to a significant number of individuals. For ease of reference, I attach to this judgment a copy of the "cast list" which is included within the bundle.

The case in brief

7. The Claimant Ms Gupta was employed by the Defendant Bank within the NCOU and was considered to be a star performer. She knew that the unit would come to a close, and there was a risk that she would be made redundant in late 2016 early 2017. As such, and recognising that she was highly ambitious, she alleges she sought answers as to her future position, which were given to her on the basis of trust and confidence and in the framework of the employment relationship. She performed her task and achieved her ambitious targets based on the assurances provided. Specifically, she did not leave the employ of the Defendant because she alleges she had an expectation that she would be rewarded for completing the job. It is the Claimant's case that the assurances given were factors which ought to have been taken into consideration and assessed in determining whether the Claimant was to be paid a bonus.

8. The Claimant's contract of employment included inter alia the following express terms.

"Discretionary Incentive Award.

All employees are eligible to be considered for an annual Discretionary Incentive Award. You may be considered for a Discretionary Incentive Award based on a number of factors including but not limited to (in no particular order of importance) the performance of the Company generally, the specific contribution of its component business units, your individual personal contribution and the need to retain you in employment within the Company.

Generally, Discretionary Incentive Awards are determined by Divisional Management and may be made wholly or partly in cash, equity, notional equity, restricted cash, or such other form as the Company may decide. The Company reserves the right to deliver a percentage (up to 100%) of all Discretionary Incentive Awards under, and subject to, any applicable DB compensation plans (equity, notional equity, restricted incentive, or such other form) that are in effect on the date a Discretionary Incentive Award is made. Such plans may provide for forfeiture of awards in certain circumstances. Discretionary Incentive Awards may be made or paid in any currency at the Company's discretion. For the avoidance of doubt, you do not have a contractual entitlement to receive a Discretionary Incentive Award and any such award in a given year will be at the absolute discretion of the Company. Moreover, you will not receive a Discretionary Incentive Award if (for whatever reason) on the date on which Discretionary Incentive Awards are usually made in a given year, you are not employed within the Company or if you are under notice to terminate your employment (whether notice was given by you or the Company) or if the Company considers your performance or conduct to have been unsatisfactory. Any portion of a Discretionary Incentive Award made as a cash payment will usually be paid in February or March through the normal monthly payroll. Discretionary Incentive Awards in any other form, including an award under a DB Compensation Plan (equity, notional equity, restricted incentive, or such other form), will be payable when such awards vest in accordance with the applicable DB compensation plan rules.

Other terms which form part of your contract with the Company are outlined in the Employee Handbook enclosed with this offer letter. Please read the Handbook carefully and in particular the 'contractual terms' which include: • Contractual Conditions of Employment; • Contractual Company Policies; • Restrictions Applying After Termination of Employment.

For the avoidance of doubt, you will be bound by these sections of the Handbook as if they were set out in this Offer Letter”.

9. The Claimant received a basic salary and had previously received fixed pay supplements, off-cycle awards and variable compensation calculated in accordance with the Bank's compensation policies. The Claimant contends that there are standard implied terms in her employment contract of a relationship of confidence and trust between employer and employee. This it is said includes a duty owed by the Defendant when exercising its discretion to determine the amount of variable compensation to be paid to the Claimant, to take into account all matters which ought to be taken into account, not take into account matters which ought not to be taken into account and reach a decision that was rational

and in good faith, consistent with the contractual purpose of the contract of employment, and to provide adequate reasons for its decision.

10. The terms of the assurances given have been pleaded both in the Particulars of Claim and in response to Requests for Further and Information made by the Defendant. Within the Particulars of Claim at paragraph 12 onwards the Claimant contends that for the financial years preceding the relevant one she received discretionary incentive payments and off-cycle awards. In 2014-15 this totalled (in addition to her salary) £325,000. In 2015-16 this totalled £485,000. The Claimant contends she sought and was given assurances in around April to December 2016 from Mr Namagiri, Mr Spaulding and Dr Sprenger in respect of her compensation entitlement. She contends her concerns regarding compensation were discussed with other individuals including Mr Cryan the global CEO, Mr Krause the global CFO, Ms Lambert global head of HR and Mr Salters the chief operating officer of the division.
11. At paragraph 19 of the Particulars the Claimant refers to the “gist” of the assurance or assurances given to the Claimant. These were generally, that the Claimant ‘*would be rewarded*’, that the Bank would ‘*take care*’ of the Claimant, that she would be paid ‘*more than ever*’ and that she would be rewarded ‘*generously*’. Specifically, that the Claimant would be treated fairly and receive variable compensation of a ‘*multiple*’ of previous years. The Claimant relies on the following Particulars.

19.3. *In or around April 2016 Mr Spaulding and Mr Namagiri stated that the Bank would “take care” of the Claimant and told her to not worry about her compensation but to focus on delivering the task. She was told that the Bank would treat her fairly and she would be paid a bonus at least in line with her previous years.*

19.4 *In or around July 2016, the Claimant was told by her Divisional Management that she would be granted an off-cycle award in the following months, as had occurred in the previous two years. She enquired about it on multiple occasions thereafter, up to December 2016, and was told that she would receive it.*

19.5. *In August 2016, the Bank’s Divisional Management reiterated the urgency to accelerate the Bank’s de-risking in Q3 2016. This was confirmed in an email by Mr Ian Salters, Chief Operating Officer, on 30th August 2016 stating that the Bank’s management wanted “to over-achieve on its RWA and IFRS targets for this quarter”. The Claimant was informed that the Divisional Management wanted to “over-deliver” on the expectation to maximise the potential compensation to NCOU staff. Mr Namagiri and Mr Spaulding assured*

the Claimant that she would be rewarded generously and would receive a multiple of previous years' compensation".

Collectively the above are referred to as "the compensation assurances". Although the Claimant asked for the compensation assurances to be given in writing this was not done. However, the Claimant contends she proceeded on the basis that the Bank would have regard to and implement the assurances made when determining her compensation. It is said that this reflected the practice in previous years in which compensation entitlement was discussed and assurances given orally.

12. In fact, the compensation decision made by the Bank was not reflective of what the Claimant says she anticipated. Despite meeting the targets imposed upon her in 2016, the Bank closed the NCOU and implemented redundancies. The Claimant was made redundant from 31 March 2017. Although she had received information in January 2017 that there were to be no individual components of the bonus, she was she says finally informed of the decision on 9th March 2017. The decision was that the Group Component of her bonus award for the 2016-2017 financial year would be £21,250; and the Individual Component of her bonus award for the 2016-2017 financial year would be zero. The Claimant was not paid any "off-cycle" award at this stage.
13. The Claimant alleges that the compensation decision was made wrongly and in breach of the contract of employment in that the Bank failed to take into account all matters which it ought to have: in particular the compensation assurances, the unique and exceptional nature of the Claimant's role in the NCOU and her exceptional performance therein and the special situation of the Claimant in providing exceptional performance with the objective of closing the NCOU and working herself out of a position. As such it is contended that the compensation decision was irrational, not in good faith and/or inconsistent with the purpose of the contract of employment. Further it is alleged that the Bank failed to give any adequate reasons for the compensation decision. In those circumstances it is alleged that the Claimant suffered loss and damage which is claimed as the difference between the amount payable pursuant to the compensation decision and the amount that would be payable on the basis of a lawful exercise of the Bank's discretion.
14. The Claimant commenced her action in in September 2022 and was asked for further clarity of the assurances that were given by way of a Request for Further Information, replied to the following year. In these Replies the Claimant made it clear that she did not recall exact dates but recalled the substance of those conversations. She reserved the right to rely on her witness evidence but specifically referred to meetings with Dr Sprenger throughout

2016 when he travelled to London, in person meetings on the 12th to 14th April 2016 with Mr Namagiri in New York, meetings in April and May 2016 with Mr Spaulding, telephone conversations with Mr Namagiri between April and December 2016 and further in-person meeting and telephone conversations with Mr Namagiri in December 2016 and January 2017. In respect of the assertion that concerns regarding her compensation and all the Bank's response to those concerns had been discussed with Mr Cryan, Mr Krause, Ms Lambert and/or Mr Salters the Claimant recalled only emails from Mr Salters in August 2016, accepting that there had been no direct conversations with the other individuals. Her understanding was that Mr Namagiri and Dr Sprenger had discussed NCOU compensation with others. It is of note that there were other significant requests for further information made, in respect of which the Claimant had no further information to provide.

15. The Defendant filed a Defence which expressly admitted the express terms of the contract. The Claimant, it stated, had been employed by the Bank from July 2008, initially as an analyst then a trader and then she was assigned subsequently to the NCOU. Her employment was terminated in March 2017 by reasons of redundancy. Within the NCOU Dr Sprenger Mr Namagiri and Mr Salters were senior managers. Mr Spaulding was the Claimant's line manager, but she also had an indirect reporting line to Mr Namagiri. Mr Namagiri and Mr Salters reported to Dr Sprenger. Dr Sprenger reported directly to members of the Bank's management board including Mr Krause and Mr Cryan.

16. In terms of the employment terms, the Defendant referred specifically to the Employee Handbook and section 33, which confirmed the following:

"Eligible employees with the Corporate Title of Vice President, Director or Managing Director and any other employee selected by the Company in Global Markets and Corporate Finance (or such other business units from time to time) may be considered for an award of Discretionary Variable Compensation consisting of two components: Group Variable Compensation ('Group VC') and Individual Variable Compensation ('Individual VC')..."

"You do not have a contractual entitlement to receive any award of Discretionary Variable Compensation (whether Group VC, Individual VC or a Recognition Award) and any such award in a given year will be at the absolute discretion of the Company and subject to applicable regulatory requirements and/or guidance in force at the relevant time..."

"...you will not receive any award of Discretionary Variable Compensation (whether Group VC, Individual VC or a Recognition Award) if (for whatever reason) on the date on which any awards of Discretionary Variable Compensation are proposed to be made in relation to a

given year, you are not employed within the Bank or if you are under notice to terminate your employment (whether notice was given by you or the Company) ...”

“For the avoidance of doubt, any discretion exercised by the Company to award any Discretionary Variable Compensation to you based on Group VC shall not be based on any single criterion such as past performance of the Bank or the relevant business division, but on a range of criteria that may vary from year to year as the Management Board in its sole discretion considers reasonable. The Company reserves the right to amend, modify or remove the various components of Discretionary Variable Compensation awards set out above for eligible employees from time to time.”

17. The Defendant also relies on the its Compensation Policy in force at the material time which stated inter alia *“...Ensuring compliance with regulatory requirements is an overriding principle in the Bank’s Compensation Strategy...”* *“...Variable Compensation (VC) is a discretionary compensation element that enables the Bank to provide additional reward to employees for their performance and behaviours, while reflecting Deutsche Bank Group affordability and the financial situation...”* *“In line with regulatory requirements, VC may only be guaranteed for a period of one year and solely in the context of hiring new employees and only be paid if equity, liquidity and capital requirements are met and is subject to any further regulatory requirements. Moreover, any guarantee for VC must be set forth in a written agreement signed by authorized representatives of the Bank...”* *“A Recognition Award may be granted to an employee to recognise outstanding contributions, as determined by the Bank in its sole discretion, and to ensure motivational impact for employees up to Assistant Vice President (AVP) level...”* *“...Reference TC [Total Compensation] is not, and should not be viewed as, any promise or guarantee to pay any particular level of Variable Compensation or Total Compensation. Recognition Awards are not part of an employee’s Reference TC.”* *“...Group affordability is the overriding consideration of the VC pool decisions...”*
18. The Bank’s Compensation Authorisation Policy, in force at the material time, further provided, inter alia, that: *“...Off-cycle awards can be granted on a limited basis to reward high performing employees identified as critical to the sustained success of the Bank. Evidence to show the employee is deemed critical to the Bank is required for award approval...”* Specifically the Bank contends that where a consideration of memorable contributions or bonuses was being made, a relevant bonus pool had been made available by the Bank for distribution amongst the qualifying employees. In doing so the Bank was obliged to take into account matters which ought properly to be to be taken into account

and not consider irrelevant matters and also to reach a decision which was rational and in good faith, consistent with the contractual purpose of the employment. However, it is denied that there was a duty to provide the Claimant with reasons in relation to the decision. The Defendant notes the Claimant received a salary which (by letter of 11 December 2015) was increased to £390,000 per annum. By that letter she was also eligible to receive the grant of an off-cycle award with a value of £200,000 expected to be vested in three equal tranches. The Claimant accepted this by signing and returning the letter. The letter itself stated that the off-cycle award was a one-off award and granted on an exceptional basis. The Claimant agreed and acknowledged that she would perform her duties productively and in good faith up to the relevant vesting dates and remain actively employed within the NCOU.

19. The Defendant's pleaded case is that by the end of 2015 the Bank had agreed an accelerated closure plan for the NCOU, communicated on 29 October of that year. It was therefore anticipated that there would be redundancy situation at around the end of 2016 and to incentivise members of the NCOU to remain in employment the payments set out and agreed to in the December 2015 letter were paid.
20. Noting the lack of specificity in relation to the assurances that were said to have been provided and reserving their position to plead further as more details were forthcoming the Defendant admitted that Mr Namagiri told the Claimant in about April 2016 to focus on her job that she would be treated fairly. However, it was not admitted that either Mr Spaulding or Mr Namagiri told the Claimant that the Bank was to take care of her. It is noted however that in the grievance which the Claimant instigated in the Spring of 2017 Mr Spaulding was interviewed and acknowledged that he may have used words to that effect when speaking with the Claimant. It is specifically denied that the Claimant was promised that she would be paid a bonus at least in line with previous years albeit again Mr Spaulding in the grievance process referred to a general expectation that members of the NCOU would be compensated in line with previous years. The defence sets out the history of communication with staff members and specifically denies that any clear assurances as to future variable compensation were made.
21. The Defendant specifically pleads that the Bank's practice, consistent with its compensation policy, was that any guarantee in respect of variable compensation had to be recorded in a written agreement signed by authorised representatives of the Bank. There is no suggestion that this was done between the Claimant and the Bank.

22. In terms of the ultimate decision in relation to variable compensation, the Defendant's position as set out in the Defence is that the Bank found itself having to make tough decisions in respect of variable compensation. In January 2017 the Bank had a clear idea of the financial impact of its settlement with the US Department of Justice (in effect a penalty was imposed) and its performance of the following year. There had been detailed and thorough discussions of the matter at management board meetings and specifically it was determined that employees of the corporate title of vice president and above would receive the group variable compensation component but not any individual variable compensation component. A limited number of employees in crucial positions for the future of the Defendant would be granted special long-term incentives in the form of shares which would be deferred for up to 6 years; the Claimant did not come into this category. Most decisions had been taken by the management board regarding discretionary remuneration throughout 2016 and it is said that the rationale was further explained in a document headed "Limited Variable compensation FAQ January 2017". In summary it is said that the Bank was in a very difficult financial position. It had made a net loss of €1.4 billion in respect of the calendar year 2016. The Bank had envisaged reducing its employed workforce by approximately 9000 full-time equivalent position. Of note no employee of the NCOU globally (which was in excess of 100) was granted a further off-cycle of award (apart from one vice-president in Italy). It is the Defendant's case that this decision was made because further payments were not affordable.
23. The Defendant contends that the decision in relation to compensation was not unlawful or in breach of contract. The decisions were taken in respect of discretionary remuneration by reference to legitimate and lawful considerations. It is denied that the Bank failed to take into account any matters that they ought to have considered. It is denied that the Claimant's circumstances placed her in a unique or special category and she was treated consistently with other directors including those employed within the NCOU. In relation to the so-called compensation assurances, it is denied that they were given in such a way as pleaded but it is also denied that the assurances themselves meant that the decision ultimately taken was unlawful. Further it is contended that the decision by the Board was not irrational nor inconsistent with the Claimant's contract. In respect of any loss or damage it was noted that the Claimant had not specified what amount or what range of remuneration she ought to be paid or how it should be structured; again, the lack of specificity in the pleading is highlighted.

24. In the Claimant's skeleton argument (and adopted by the Defendant in closing) the following 3 questions were identified as requiring resolution by the court. Whilst accepting that there are other matters to be determined, I accept that the following questions need to be addressed:

Issue 1: were the compensation assurances given and was the compensation decision unlawful by reason of D's failure to take the compensation assurances into account?

Issue 2: is the compensation decision alternatively unlawful on the basis of inconsistency with the contractual purpose and/or irrationality and/or failure to give reasons?

Issue 3: If D did not make a lawful decision, what is C entitled to by way of damages?

Each of these issues requires determination against the legal background set out below.

The law and legal background

25. The consideration central to this case is the Court's supervisory role over a discretionary bonus scheme. The Claimant had no contractual entitlement to a bonus (VC). She merely had a contractual entitlement to be considered for VC As expressed in *Harvey on Employment Law* at [33.01]:

"The starting point must always be the express terms of the contract of employment. However, the enquiry does not stop there and the courts are prepared to rely upon implied terms in the employment contract to ensure some judicial oversight of discretionary bonus decisions." In those circumstances, it is necessary to consider the express terms, the implied terms and the authorities which serve to circumscribe the employer's discretion.

26. The "Discretionary Incentive Award" is contained in the Claimant's contract of employment (Bundle p262 onwards); it sets out that this is a discretionary award; I refer to the contract above. The contract expressly refers to other documents which form part of the Contract, outlined in the Employee Handbook (as set out above). The Variable Compensation was described in the Compensation Policy at p2526 as set out at paragraph 17 above.

27. It is accepted that, in addition to these express terms, there were implied terms of confidence and trust. It is accepted that there was an implied term that when considering the amount of variable compensation to be paid to the Claimant, the Defendant would:

- i. take into account all matters which ought to be taken into account and not take into account any matters which ought not be taken into account; and/or

- ii. reach a decision that was rational and in good faith and consistent with the contractual purpose of the Contract of Employment.
28. The Claimant describes a “*contractual straitjacket*” through which the discretionary bonus must be considered. As such, it is said that the relevant contractual documents are only the contract of employment and the Employee Handbook. Other documents referred to by the Defendant, in terms of the Compensation Policy and the like are evidence of the governance process and do not form part of the contract between the parties. The Defendant contends that the Compensation Policy is a relevant document in determining this case because it explains the basis upon which the discretionary power to award bonuses is put into effect. The same is true of the Compensation Strategy, and the Compensation Authorisation Policy. Although these are policy documents rather than pure contractual documents the Defendant contends that they provide the court and the parties with the background rationale and method of decision making which has to be relevant to the determination of what are relevant considerations and whether a discretion has been exercised rationally (i.e. Limbs 1 and 2 considerations as set out in *Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223 233*). I accept this as a correct approach. Although as a strict matter of contract, the policy documents are not incorporated into the contract, they are guidance to how the discretionary power is to be exercised and are relevant in determination of whether that has been carried out in line with *Wednesbury* reasonableness. If there is a clear conflict between the contractual documents and the guidance documents, I accept that the contract takes priority. In this case I do not believe that there is a direct conflict between the contractual and policy documents. The policy documents provide context for and guidance for the exercise and application of the contractual rights.
29. In terms of exercising their contractual discretion, it is now well-established and accepted by both sides that where an employer is required to exercise a discretion in respect of a contractual obligation, both limbs of the *Wednesbury* test (as set out below) will constrain the exercise of discretion. This was the position confirmed in the Supreme Court in the case of *Braganza v BP Shipping Ltd (2015) UKSC 17*. In that case the Supreme Court was considering the exercise of a discretion of an employer in respect of paying out death benefits to a widow whose husband had died whilst employed by the Defendant. An internal investigation had been carried out which concluded that Mr Braganza may have taken his own life and as such, the employer decided there should be no payment of death benefits. It was argued that the investigation was not carried out adequately and hence the

decision to make no payment was not a valid one. Baroness Hale set out important principles (at paragraph 18):

“18. Contractual terms in which one party to the contract is given the power to exercise a discretion, or to form an opinion as to relevant facts, are extremely common. It is not for the courts to rewrite the parties’ bargain for them, still less to substitute themselves for the contractually agreed decision maker. Nevertheless, the party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest. That conflict is heightened where there is a significant imbalance of power between the contracting parties as there often will be in an employment contract. The courts have therefore sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision-making power is given.

19. There is an obvious parallel between cases where a contract assigns a decision-making function to one of the parties and cases where a statute (or the royal prerogative) assigns a decision-making function to a public authority. In neither case is the court the primary decision-maker. The primary decision-maker is the contracting party or the public authority. It is right, therefore, that the standard of review generally adopted by the courts to the decisions of a contracting party should be no more demanding than the standard of review adopted in the judicial review of administrative action. The question is whether it should be any less demanding...”

30. Previous authorities had focussed on limb 2 of **Wednesbury** reasonableness. The test itself has, of course got 2 limbs: The court is entitled to investigate the action of the local authority (decision maker) with a view to seeing whether they have taken into account matters which they ought not to take into account, or conversely, have refused to take into account or neglected to take into account matters which they ought to take into account (limb 1). Once that question is answered in favour of the local authority (decision maker), it may still be possible to say that, although they have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it (limb 2). As such, the first limb focuses on the decision-making process, whether the correct matters had been taken into account. The second focuses on the outcome: whether even though the right things had been taken into account, the result was so outrageous that no reasonable decision maker could have reached it.

31. Baroness Hale held at paragraphs 29-30:

“29. If it is part of a rational decision-making process to exclude extraneous considerations, it is in my view also part of a rational decision-making process to take into account those considerations which are obviously relevant to the decision in question. It is of the essence of “Wednesbury reasonableness” (or GCHQ rationality) review to consider the rationality of the decision-making process rather than to concentrate on the outcome. Concentrating on the outcome runs the risk that the court will substitute its own decision for that of the primary decision-maker.

30 It is clear, however, that unless the court can imply a term that the outcome be objectively reasonable (for example, a reasonable price or a reasonable term) the court will only imply a term that the decision-making process be lawful and rational in the public law sense, that the decision is made rationally (as well as in good faith) and consistently with its contractual purpose. For my part, I would include both limbs of the Wednesbury formulation in the rationality test. Indeed, I understand Lord Neuberger PSC (at para 103 of his judgment below) and I to be agreed as to the nature of the test.”

32. As to the scrutiny the court should exercise it was recognised by Baroness Hale at para 31 that it would be a mistake to scrutinise decisions in a way that is demanded in a court of law. Nor would “some slight misdirection” matter, at least if it were clear that, had the legal position been properly appreciated, the decision would have been the same. It may very well be that the same high standards of decision making “ought not to be expected of most contractual decision-makers as are expected of the modern state”. It was recognised that context may be important, and that, an employment contract may differ from a commercial contract. As Lord Hodge stated (paragraph 53 onwards):

*“53...I think that it is difficult to treat as rational the product of a process of reasoning if that process is flawed by the taking into consideration of an irrelevant matter or the failure to consider a relevant matter. While the courts have not as yet spoken with one voice, I agree that, in reviewing at least some contractual discretionary decisions, the court should address both limbs of Lord Greene MR’s test in **Associated Provincial Picture Houses Ltd v Wednesbury Corpn** [1948] 1 KB 223 233–234...”*

*“54. In my view it is clearly appropriate to do so in contracts of employment which have specialties that do not normally exist in commercial contracts. In **Johnson v Unisys Ltd** [2003] 1 AC 518, para 20 Lord Steyn stated: “It is no longer right to equate a contract of employment with commercial contracts. One possible way of describing a contract of employment in modern terms is as a relational contract. Similarly, in **Keen v CommerzBank***

AG [2007] ICR 623, para 43 Mummery LJ stated: "Employment is a personal relationship. Its dynamics differ significantly from those of business deals and of state treatment of its citizens. In general, there is an implied mutual duty of trust and confidence between employer and employee. Thus, it is the duty on the part of an employer to preserve the trust and confidence which an employee should have in him. This affects, or should affect, the way in which an employer normally treats his employee".

"55. The personal relationship which employment involves may justify a more intense scrutiny of the employer's decision-making process than would be appropriate in some commercial contracts."

"56. The scope for such scrutiny differs according to the nature of the decision which an employer makes..."

*"57. In cases such as **Clark v Nomura International plc**, **Keen v CommerzBank AG** and **Horkulak v Cantor Fitzgerald International** [2005] ICR 402 the courts have reviewed contractual decisions on the grant of performance-related bonuses where there were no specific criteria of performance or established formulae for calculating a bonus. In such cases the employee is entitled to a bona fide and rational exercise by the employer of its discretion. The courts are charged with enforcing that entitlement but there is little scope for intensive scrutiny of the decision-making process. The courts are in a much better position to review the good faith and rationality of the decision-making process where the issue is whether or not a state of fact existed, such as whether an employee's wilful act caused his death. The decision of the employer is not a judicial determination, and the court cannot expect judicial reasoning. But I see no reason why an employer's decision-making should be subject to scrutiny that is any less intense than that which the court applies to the decision of a public authority which is charged with making a finding of fact. A large company such as BP is in a position to support its officials with legal and other advisory services and should be able to face such scrutiny".*

The Claimant contends that the Defendant here is a large company in a similar position to that described above.

33. In an employment context I have been referred to Vos LJ at para. 19 of **Hills v Nixsun** [2016] IRLR 715: "... but the law has since moved on in the Supreme Court's recent decision in **Braganza v BP Shipping Ltd** [2015] UKSC 17, [2015] IRLR 487 where it was held by the majority (Lady Hale, Lords Reed and Hodge) that a contractual discretion is to be exercised in accordance with both limbs of the **Wednesbury** test, namely that it was not unreasonable and that all relevant matters and no irrelevant matters had been taken into account

(paragraphs 24 and 53). Moreover, the burden was on the employer to show that its decision was a reasonable one, and if the employer has acted in such a way as to engender particular expectations in an employee, those expectations are a relevant consideration in assessing whether an employer has acted rationally “

34. The Claimant's case is that the decision by the Defendant in terms of its bonus decision was legally flawed, by reference to limb 1 of **Wednesbury**. The Claimant's case in its simplest form, is that assurances were sought and given; they were material considerations that fell to be assessed by the Defendant. In failing to do so it is said that the decision was invalid and void under **Wednesbury** limb 1 in that the Bank failed to take into consideration factors which it ought to have. Further if they were not to be taken into account, the Defendant was required to have legally sufficient reasons and to give those reasons to the Claimant.
35. It is accepted that, in terms of **Wednesbury** limb 1, the question of whether a matter ought to be taken into account is a legal question for determination by the court. The weight to be given to the matters to be considered is for the decision maker. **Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759** per Lord Keith, at p.764G-H: “*It is for the courts...to decide what is a relevant consideration. If the decision maker wrongly takes the view that some consideration is not relevant, and therefore has no regard to it, his decision cannot stand, and he must be required to think again. But it is entirely for the decision maker to attribute to the relevant considerations such weight as he thinks fit, and the courts will not interfere unless he has acted unreasonably in the Wednesbury sense.*”
36. The Claimant contends that the assurances were relevant by reference to the express terms of the employment contract and handbook, as pay was central to the employment relationship. Further (but perhaps less forcefully argued) it is said that the Claimant's performance factors having regard to the unique features of the NCOU were legally relevant considerations. The Claimant's position is that it is an exercise of fairness on the part of the court.
37. The Defendant's position is that the determination of what are relevant factors has to be considered in context: the court is entitled to determine that other factors save for affordability were not relevant given the context of the Bank's financial situation. Employment contracts regularly state that bonuses are discretionary, as in this case, and the courts have long exercised some control over the exercise of the employer's discretion. However, successful claims in that regard are said to be uncommon (see *Clark and Keen* referred to in *Braganza*).

38. On appeal in *IBM UK Holdings Ltd v Dalglish* [2018] IRLR 4, it was held that the “*Braganza*” term extended to the application of the implied trust and confidence contractual term (this was a pension case, not a bonus one, but still consideration of the exercise of an employer’s discretionary powers). Limb 1 of *Wednesbury* was not argued (i.e., whether relevant matters had not been considered) but the case rested on Limb 2. It was held: (para 232): “*The correct approach is to apply a rationality test equivalent to that in Wednesbury ... the question was whether the decision taken was one which no rational decision-maker could have reached. Although the judge directed himself that the test to be applied was one of capriciousness, perversity or arbitrariness, which is close to the rationality test, he accorded an overriding substantive significance to the Reasonable Expectations such that they could only lawfully be disappointed in a case of necessity, which is not compatible with the correct approach. Members' expectations, even if they satisfy the judge's criteria for a Reasonable Expectation, do not constitute more than a relevant factor which the decision-maker can, and where appropriate should, take into account in the course of its decision-making process.*” The court did discuss “Reasonable Expectations” generally (268 onwards). I note at this stage that the present case is not put by the Claimant on the basis of “Reasonable Expectations” upon which the Claimant relied in a strict legal sense, and I expressly do not consider this as an issue to be determined in a strict legal sense either. In *Dalglish* I note that “Reasonable Expectations” were deemed by the court to require sufficient clarity and certainty so that it would be clear to all parties that they would constitute legal rights. That is not how the Claimant puts her case.
39. Nevertheless, I consider the Defendant’s position (and I note the Claimant’s skeleton argument in this regard), even if contrary to their case “assurances” were given, there is an additional step before such “assurances” can be considered a relevant factor which the Defendant ought to have considered: as applied by Leggatt J (as then was) in *Brogden v Investec Bank plc* [2014] IRLR 924, namely whether any relevant assurances created reasonable expectation (in lower case): I take that to mean, whether the Claimant could in reality have considered them to be assurances, in the context they were made, or whether she, in reality, considered them as mere hopes and aspirations (as opposed to “Reasonable Expectation” in a strict legal sense.) The Claimant refers to expectations and may have, it is alleged, made arrangements based on them; the Defendant contends that any assurance/expectation cannot be determined in isolation. What exactly was the “expectation”: that she would be paid unspecified bonuses “willy-nilly” i.e., even though the Bank said it was unaffordable? The Defendant contends that in this context, no assurance

can be upheld. As such, it was not a relevant factor for the court to consider and can properly as a matter of law be a factor the Bank did not have to take into account. I will deal further with my assessment of these issues as set out below in my analysis.

40. Turning to the 2nd limb of **Wednesbury**, the Claimant's case is that the compensation decision itself (in the amount of £21,250 for 'Group Compensation' and nil for the 'Individual Component' and no off-cycle award) was irrational, partly through failure to take into account relevant considerations but also on its own terms. It is said that as the Claimant's performance was exceptional in its particular circumstances, it was irrational of the Defendant not to honour its express or implied bargain that she would be paid for the job, reflecting achieving the targets set.
41. The Defendant's position is that factually, there were no such assurances to be considered. Further, the Claimant and others in the NCOU had been compensated by the off-cycle award and by significant backdated salary increase in December 2015. This was a retention scheme which was sufficient and effective. In the circumstances that the Bank found itself, recognising that the Compensation policy it was applying was "subject to affordability", its decision was rational, concluding that it could not establish any IVC pool for affordability reasons. The Bank could not attribute any weight to the question of individual performance, divisional performance and the "special" position of the NCOU because of the primacy of affordability considerations (which involved considerable regulatory oversight). The Defendant contends that this is consistent with public law principles as set out in *Tesco Stores* (above). The Claimant's performance, along with "thousands of other" employees may have been very good, but it is said that in this context, that does not matter.
42. The Defendant rightly reminds the court that as the decision maker, the Bank has a wide margin of discretion providing it acts rationally. The Bank relies on a chain of decision making, a detailed process through 2016 that the Bank engaged in. The decision it is said was made rationally and as Lord Hodge observed in *Braganza*, at para.57, "*there is little scope for intensive scrutiny of the decision-making process*".
43. In my judgment it is necessary to approach the evidence in this case, and the conclusions I draw from it, against the background of these legal principles. I will apply **Braganza** to determine, pursuant to **Wednesbury**; whether, if assurances were given, they and other matters were issues which the Defendant ought to have considered in determining the bonus decision. If there were such assurances and they ought (as a matter of law) to have been considered, I will consider what weight the Defendant ought to have given to those

matters. In determining limb 2 of **Wednesbury**, I will consider whether the decision made was irrational.

The witness evidence

44. During the course of the trial, I had the opportunity to listen to and assess the oral and written evidence of a number of witnesses. I have reconsidered the witness statements and the oral evidence for the purpose of this judgment. I have considered all of the evidence in the round, recognising that witnesses are referring to incidents that took place 8 or 9 years previously. In so far as it is possible, I have therefore cross-referred to contemporaneous documentation to evaluate if this is consistent with the evidence now given. I am satisfied that all witnesses gave evidence believing that they were telling the truth. However, it is clear that not all share the same recollection of events. I therefore have to determine what evidence I find to be relevant and reliable.

The Claimant

45. Ms Gupta gave evidence as to what she said were the assurances provided to her by the Defendant, in the context of her concerns for her future in the Bank, with the accelerated closure of the NCOU. I have referred to how the case was put in the pleading above. How did the Claimant put these matters in her witness statement? I have extracted from the witness statement relevant extracts (whilst considering it in its entirety). She stated: P179
“Given the passing of time, I can only recall the gist of the assurances. I recall having regular conversations about my compensation with Mr Spaulding, Mr Namagiri and sometimes with Pius Sprenger...Each of these conversations were very similar, namely that the Bank would compensate me generously if I met the ambitious targets for the accelerated de-risking of the WinCap & other NCOU portfolios...

When I was initially told to create a plan for the accelerated de-risking of my portfolio at the NCOU in mid-2015, I was assured that the NCOU management was working on a special compensation package for its employees. This included a retention payment to be delivered soon, followed by a significant increase in salary...

Both the salary increase and the retention payment were eventually delivered, albeit later than anticipated. I received a 30% increase in salary and though it was only declared in December 2015, it was implemented retrospectively from January 2015 (the Off-cycle payment) ...

Mr Spaulding told me that upon the successful de-risking, the key NCOU contributors (which included me) would receive multiples of the prior year's compensation. Mr Spaulding also said that the NCOU compensation would take the form of retention payments and a

significant variable compensation. He told me that the increase in the base salary was primarily to create the headroom for the variable compensation...

My conversations with Mr Spaulding were frequent and generally in person, often over a coffee. Mr Spaulding made reference to the fact that since we were completing a four-year job in one year, the compensation would be between two to four multiples of our prior annual compensation if we achieved our targets. Mr Spaulding referred to this range on several occasions in our conversations over the period of 2016...

In April 2016... Mr Namagiri reiterated his assurances that I would be renumerated.

...Some of my recollections have been aided by listening to the telephone recordings between Mr Namagiri and I in May 2016.... the tone and clarity of the assurances are representative of the conversations that I had with Mr Namagiri, Mr Spaulding and Mr Sprenger. The overarching objectives of these conversation was to give enough assurance so that I would remain with the Bank and achieve my targets and, in return, the Bank would give me an exceptional incentive payment...

Mr Namagiri suggested that I consider looking for a job later in Q3 of 2016 or thereafter. Mr Namagiri also said that the NCOU Management were working on securing employees' bonuses before the end of year, rather than waiting for the following year. I interpreted this as them paying me an additional Off-Cycle award, just like they did previously in 2014 and 2015. Mr Namagiri also made references to what Mr Sprenger had been told in his conversations with Mr Cryan. Srinu relayed the position that compensation would be generous and would consist of multiples of previous years, which gave me the assurances I needed that this was signed off by the Bank".

46. At paragraph 37 the Claimant stated that she relied on the express assurances given to her and continued to work and meet her targets (see also para. 44 on in witness statement). There were further discussions in December 2016:

"On 18 January 2017, it was announced that no bonuses would be paid for 2016. This came as a complete shock to me given the assurances that I had received throughout.

2016. He told me that this decision did not apply to the NCOU and that I would still receive a bonus payment, in one form or another, as the NCOU would be treated differently to the rest of the Bank. Mr Namagiri then informed me that he was still waiting to hear from Mr Sprenger who was in conversation with Mr Cryan".

47. The Claimant was cross examined extensively as to her precise recollection as to what was said to her and when. It must be remembered that the Claimant is relying upon her recollection of events which took place in 2015, 2016 and early 2017. As such, it is of

assistance to look at contemporaneous evidence to see what was recorded as being said at the relevant time. The Claimant accepts that no such assurances were put into writing.

48. In terms of the telephone calls the Claimant relies upon I have carefully considered the transcripts of the calls between the Claimant and Mr Namagiri because her position in her witness statement and under cross examination is that these conversations were reflective of assurances provided to her in respect of her future career and compensation. I have considered the transcripts as a whole and identify certain quotes below which properly reflect the tone of the conversations overall:

May 2016: p2583

"Mr Namagiri: It's lasted a good three, four years, you know, good things have happened, and believe me, you know, this is going to be the blockbuster year, the best year of them all. In fact, it's actually, you know, inversely proportional, especially for you, I think, you did bigger things before, you got paid less and you had a lower title. You're doing smaller things as time keeps going on, but you have a higher profile, you have a higher comp (sic), you have a higher title, everything is, you know, (Inaudible) mostly correlated. So, do not like worry too much about tomorrow or the day after because the whole point is that (Several inaudible words). I think you have spent a lot of time on this stuff, maybe a little too long, but at least, you know, it's a good outcome that you've brought everything to an end.

Claimant: I know, and even if you gave me a guarantee it might not really last because there are things that might not be in your control either. So, I appreciate that.

Namagiri: No, no, but I don't mean guarantee in comp (sic) terms, I mean more in terms of career terms.... people don't get runways, people, like, you know, people get told overnight that this has happened, and next thing they know is, they don't know what to do, whereas you have a lot of time to plan for it. so, we agreed into a contract with the Bank, and you know you did receive both retention and the comm and higher rates. They expect the job done this year. And again putting the first view that I have in mind, if you start slipping it gets very ugly..."

(There was then a long discussion about the jitteriness of the market)

"There is no-one, like, you cannot name one job, one person, one Bank, one institution unless it's paying you £100,000 a year and that's it, that is going to last forever, right?..."

"So, don't worry too much. I think you are being well looked after, we'll try to do the very best, and we've agreed to do a certain task, and we've got to do it..."

This conversation contained considerable discussion about the Claimant's job security and future. There is very little within it referring to commission. I believe the only comments are

as set out above. The caveats about the uncertainty of the Banking industry are clearly expressed by Mr Namagiri.

49. The second transcript (p2609) contains no discussions as to commission nor job security. The third transcript (p2618) contains a discussion regarding future roles for the Claimant within the Bank. The Claimant appeared to be seeking clarification as to what she would be doing over the next 3- 6 months as she felt that she could complete her outstanding work in a short period. She appears to be seeking reassurances as to her future employment. Mr Namagiri expressed the view that the job needed to be completed.

P2620 "So I think, you know, when we have conversations between management to try to get everything pretty close to zero. I would say is the number one priority. Because then you can say, you know, we got things done. You need to pay us, you need to take care of people, you need to do everything".

He then moved on to different paths that the Claimant could take in relation to future employment, and setting up meeting for her. He stated:

(p2621) "And the third thing, which I have to say, you know, as being a manager in Deutsche Bank is that nothing is guaranteed for anyone. Because you know, I'll attempt, everyone will attempt. But you know, even for completely regular ongoing businesses, you know, accidents can happen. Management can change. You know, people can say, you know, job hasn't been done. Like, why should people be looked after? Anything can happen... But that is what I call as you know, is a normal cost of doing business. There is no business on earth where there is guarantees that people will be looked after forever. Unless you're working for the government or something like that. So, which we are not. So the long and short is, yeah, I'm looking at different answers. I'm looking at it."

I note that, again, this appears to be in the context of the Claimant seeking a future role in the Bank, with no specific mention of commission or bonus. The language, expressed by Mr Namagiri, would appear, objectively assessed, to be one of aspiration to secure a future role, but not a certainty or assurance.

The Claimant, within this conversation, appeared to accept that there were uncertainties:

(P2622) "Srini, you're trying to do the best in your capacity. And you have all the intentions to do the right thing for all of us. But at the same time, you know, DB being an institution you are also, Srinivas Namagiri, you are not an institution itself. So there are a lot of unknowns to that..."

She explained that he had previously said at Q1 not to look for a job, but to wait until Q 3 "and then we'll start" (the inference being, start to look for another role at that point,

because she continued to discuss her career, and being involved). The balance of the discussion was about possible future roles for the Claimant.

(p2626) *“Mr Namagiri: But -- and you know that is exactly where we are. But you know, there can be no guarantees for anyone in the world anywhere.*

Claimant: But that's exactly what I want to clarify.

Namagiri: No one can have a guarantee.

Claimant: I'm not expecting anything, Srini, and I am not expecting any guarantees for that matter. All I'm expecting is clarity. Because you know, I have put in my trust in my management.”

At page 2630 Mr Namagiri continues: *“Like, you know, I'm being questioned on future. I don't know about future. I cannot give guarantees about future. I have never even given guarantees about comp, which is, you know, far greater in my control. Because honestly, you know, how can I commit to things I don't know about. All I can commit to is process, product is an unknown. But as long as the process looks good, product is likely to be good. But that's all I can say.”*

An objective interpretation of these conversation would lead to the conclusion that Mr Namagiri was making it clear he could give no guarantees as to either future roles or future compensation. Mr Namagiri encouraged the Claimant and others to have an updated CV and look at the market generally: *“But it isn't end of the world to go out and check out what is out there. Because it's not cold and dark and freezing for everyone and everything. Yeah, I know for a lot of people it can be, but not, not for everyone.”* This is the language not of assurance, promise or guarantee. This is the language of uncertainty and lack of knowledge as to outcome. As Mr Namagiri said at p2637 *“Because you know, what we are walking in the world and most of the real world is nebulous. There tends to be unknowns and uncertainties everywhere, at every step at every place. There is no two ways around it for that”*. At p2647 the Claimant asked Mr Namagiri if her would write a reference letter for her, which he readily agreed to. This is suggestive of the fact that the Claimant was at this stage considering her future roles.

50. In so far as the Claimant contends that those conversations were demonstrative of assurances given to her, my reading of them is that no assurances as to either future roles or future commission were given within those conversations. The fact that the Claimant appears to rely upon them as evidence of assurances and in line with what was said to her by other managers is of note. Objectively, it is difficult to see how those conversations can be interpreted in a way as to give assurance.

51. In her oral evidence the Claimant contended that there were assurances given in these conversations: *"Like I said, this whole conversation was so long and so focused on finding me a job, him saying that was more like a metaphor and not really in my mind that he is trying to say he's -- he is now saying that there is no assurance"*. On an ordinary reading of the telephone transcripts, it is difficult to understand how the Claimant could have reached that conclusion. She made reference to the tone in which comments were made but I have not been directed by her counsel to listen to the recording (which is available) and to consider that tone. I therefore place reliance upon the transcripts and my objective analysis of them. In my judgment they do not support the Claimant's case that contemporaneous assurances were provided to her upon which she could rely. Any reassurance as to her position appears, from the transcripts at least, to have been only in the most general terms, and hugely caveated. I will deal with Mr. Namagiri's interpretation of the telephone recordings below.
52. In March 2017 when the compensation decision was confirmed, the Claimant initiated a grievance procedure. She set out her grievance in an email that she wrote herself (p2337). She also sought legal advice and a formal letter before action was sent on her behalf from solicitors dated 22 March 2017 (p2324). That letter refers to the history and alleges that on multiple occasions in 2016 the Claimant met with Mr. Spaulding and Mr. Namagiri: *"Our client was repeatedly told by Mr Spaulding and Mr Namagiri that she should not worry about her compensation as the Bank would "take care" of this...Our client was reassured that she would be treated fairly and that her variable compensation would be at least commensurate with previous years" "In August 2016... our client was again assured by her managers, Mr Namagiri and Mr Spaulding, that she would be generously rewarded for her hard work during 2016 when it came to decisions regarding variable compensation."* There are further assertions as to what was said by Mr Namagiri in December 2016 and January 2017. It is of note that there is no mention in that letter of any assurances having been made by Dr Sprenger. There is also no mention of compensation being paid in multiples of previous years.
53. The Claimant took part in a grievance interview, the transcript of which I have carefully considered. She discussed in advance what issues would be raised and as such had, I find, ample opportunity to raise any outstanding matters. I recognise that a grievance procedure is neither judicial nor quasi-judicial in its nature. It is relevant however to consider what the Claimant raised as pertinent issues at that stage, and her account as to what she said she had been told. I have extracted below extracts which I consider to be of note, but I have

considered the transcript as a whole: LM is Lynette Maree (Employee Relations). SG is the Claimant. Also present was Ms Nisha Dave, of Employee Relations

Regarding the off-cycle award: (p2385)

LM: *Okay, fine. Just to clarify, you said this off-cycle award was in order to retain you and pay you the market rate for your role. Yeah?*

SG: *Exactly, because we were legacy, so we were looking at the context of this. Our job was ending soon.*

Regarding the detail of conversation and the background (p2386)

SG: *When I went to New York, (NB April 2016) I think it's important to know that, during 2015, when we decided or when we were working towards this acceleration de-risking, it means that, instead of finishing the job in the next two or three years maybe, NCOU came up with a plan that everything needs to be done and shut down by end of 2016.*

Ever since then, there were just two main important points or matters that all the office was concerned about. One was, like, what are we going to get paid. Obviously we were ending our job and ending our careers sooner than our natural profile would be.

The second was our transition into new roles. When it was about what is it we are going to get paid, it was always about, okay, you will get paid a bonus and a retainer, because that's exactly what I had been getting paid for the last, you know, other years as well...

LM: *When you say 'retainer', do you mean this retention bonus?*

SG: *This off-cycle, yes. In my casual words, typically people refer to each other as retainer on this plan*

LM: *Okay, so when you spoke with Srini, he said, 'Get on with your work and we'll take care of it'. When he used those words, did he say, 'We will take care of your compensation', or 'take care of you as an individual, in terms of finding alternative employment', or was it just 'take care of it' and you've kind of made assumptions about what that means? If you could, give us some context.*

SG: *It was both, because I specifically was concerned about compensation. Also, I clearly remember at that point raised about the job or the transition into a new role. He told me that, you know, this is too early. Q3 is when you start looking at other jobs, so thinking about the next job, 'Q3' meaning quarter three of the year.*

Upon her return she said she had a conversation with Mr Spaulding:

SG: *...don't remember exactly, but it was always the same thing, which was, you know, 'When are we getting paid and how is it looking?' He would say that, because I had this*

last year going on as well and I was just continuously asked to just focus on things and don't worry about these things that management is working on.

Okay, fine.

And Matt would take care of it.

LM: Okay, sorry to interrupt you. That was also in April, yeah?

SG: Yes.

She was asked whether there were any caveats expressed by either Mr Namagiri or Mr Spaulding. In response the Claimant stated (p2387): "I mean, to some extent, they would like to give me the comfort that I shouldn't worry about it, but they would also say that they're working with the management board. I don't know exactly who speaks to the management board, whether it's Srini or Ian Salters, who was the COO, but they would always say that Srini and Pius [Sprenger], who is the head of the division, that's how they've been working on it, and I should just focus on my job. You know, Matt would give me the same; he would tell me the same thing, that he is speaking to Srini, and Srini and Pius are working on it...I don't recall the words exactly that he (Mr Namagiri) used, but yes. I would expect the Bank to treat as-us fairly if we are ending our job. (This was in response to a specific question as to whether Mr Namagiri used the words "you'll be treated fairly")

In respect of off-cycle awards the Claimant said there were conversations with Mr Spaulding p2389:

"LM ...and he specifically said that these off-cycle awards would be coming to NCOU staff in the coming months.

SG: Yes. I don't know about if he said that to the whole NCOU staff, but he definitely told it to me.

LM: Okay, fine. Did he give you any indication of what the numbers might look like?

SG: No."

The Claimant referred to the telephone conversations with Mr Namagiri

"SG: As in get it paid, because even the retainer wasn't paid until this time, so I was raising the same concern that they've been promising all this while and I haven't seen any result yet."

The Claimant was asked if the words "generously rewarded" were used (as set out in the letter of claim) to which she replied (p2391)

"SG: I was always told that 'You don't have to worry; you will be taken care of, and I have to give it to them; they've always taken care of me. It's not that I had issues before that I'm not being compensated or I felt that I'm not paid well but, last year, when things

were coming to an end, it was one of my main concerns. Once the job is done, then the Bank might not pay us and then what are we going to do, because I don't have anything in writing yet? That's why I always kept insisting, just to avoid the same situation. We should have something in writing to something delivered soon to us"

I note there that the Claimant accepted that nothing was put in writing to her and she "kept insisting" suggesting that she appreciated the importance of written assurances.

In relation to a meeting around 15 December 2016

"LM: There's a reference to a meeting around 15 December with Srini and shortly thereafter with Matt. You stated they gave the reason for NCOU staff to be retained on the platform until 31 March was in order to pay variable compensation. I know that you've already touched on a lot of this but, just for our clarity, this is the first time that it's mentioned in this Lewis Silkin letter, so by yourself, that the de-risking would be complete by the end of the first quarter of 2017, not the fourth quarter of 2016. Is that correct?

SG: There was an email from Ian Salters to the entire division again, where he mentioned that NCOU would shut down; everything would be done by end of December, but all the staff would stay until the end of March. It had [ignored anymore?] that to qualify for variable compensation. When Srini was over in December sometime, I caught up with Srini and said, 'Everything was coming to an end and we still don't have the retainer letter'. He said that this whole thing, they are keeping us in the Bank until March, so that they can pay us a good variable compensation. That is what even Matt reiterated because, during the same time when Srini was here, I caught up with Matt as well, soon after my catch-up with Srini."

In December 2016 the Claimant filled out an IDS form

(p2393) *"LM: Why have you raised this point about you completing an IDS form?*

SG: It was just to - to basically illustrate the same point which is I was expecting, and even Matt was expecting that I would be paid a pretty good bonus for which he would require to fill and IDFS form. And I - he would need my help for it".

The Claimant accepted that she did not know if someone filled in such a form even if they were not receiving a bonus. She appeared to rely upon that form as an assurance of future bonus (I note that this is not included in the compensation assurances pleaded): *"the IDS form is only applicable to employees who receive significant variable compensation and not to anyone who just receives the variable compensation. So, that is the reason, because IDF... is only for certain individuals who get paid very high variable compensation. And not just any*

variable compensation. So I thought considering me again for the... IDF form was pretty obvious, and was like, as a matter of fact that I would get paid very good compensation.

LM Okay, fine. And a significant amount is that?

SG: Yes

(P2396) "Matt also confirmed that promises were made and the inputs were provided in line with those. But they were rejected by HR."

The Claimant was asked if she was treated in line with all the other staff in NCOU, would she have an issue still. She responded (p2397): *"the thing that only concerns me is what I was told and what I am getting and I would love for others to get more as well, but this is not what I was promised. In fact, the day John Cryan's email came out, regarding the zero compensation, the next day, Srini called up my land line and I raised the same point to him that, you know, this is really very bad and he said to me, on that phone call, that he would believe that this is not applicable to us and NCOU should receive it separately, because this is exactly what I would have expected, because all this year, they were promising that they would - we should do our job and they would compensate us very well, and then suddenly this email shows up which does not make any sense to me."*

p2401 "LM: Is there anything further that you think we should know that we haven't already specifically discussed for us to take this investigation forward?"

SG: No, I think this is pretty much it. It's not just me, but even if you speak to anyone else in NCOU, you'll pretty much hear the same thing, including with Srini and Matt, and Pius, for that matter."

I note that although Dr Prius Sprenger had been mentioned as a decision maker, it was at no time, in the letter of claim or the grievance, suggested by the Claimant that Dr Sprenger had made assurances or promises to her.

54. I contrast what is said in those contemporaneous documents and what the Claimant said in court in oral evidence. She was extensively cross-examined as to why Dr Sprenger was not mentioned in her original grievance. She responded that the format of the interview (in a Question-and-Answer format) did not make that easy to do, and that she had said he could be spoken to. However, it is of note that the questions were based on the grievance letter that the Claimant herself provided and she was given the questions in advance. She therefore had ample opportunity to allege that Dr Sprenger had made assurances to her.

She did not do so at the time. How it is that the Claimant came to recall those alleged assurances at a much later date when her claim was pleaded is unclear.

55. The Claimant accepted that the assurance now relied on that she would be paid “multiples” of previous years’ compensation, was not something raised at the time in the grievance. Her response that “she was trying to help out the Bank to carry out an investigation” does not provide a credible explanation as to why this important factor was not raised contemporaneously, as the Bank’s investigation centred upon the complaints made by the Claimant herself.

56. The Claimant was asked to explain the precise nature of her complaints in respect of the assurances. The following points are, in my judgement, of note:

- Although in her grievance she had asserted that the compensation she received was in breach of the Bank’s compensation policy, she was unable to explain how, save that what she received was in breach of assurances given.
- The Bank’s compensation policy (p2522 onwards) was accepted by the Claimant as intended to inform employees as to what happens vis-à-vis compensation. She could not recall having read it (despite referring to it in her grievance letter). The policy includes “Core Remuneration Principles”. “Core principle 1 is: “The alignment of compensation to shareholder interests and sustained firm-wide profitability, taking account of risk and the cost of capital”. The Claimant accepted that the Bank had a duty to comply with its regulatory requirement.
- She was taken to the part of the policy in respect of variable compensation “The variable compensation is a discretionary compensation element that enables the Bank to provide additional reward to employees for their performance and behaviours whilst reflecting Deutsche Bank Group affordability and the financial situation”. The Claimant accepted that affordability was therefore a relevant factor but was unable to comment on the proposition that, if the Bank cannot afford to pay a discretionary sum, it would not be under an obligation to pay it: *“I’m not a legal expert, but what I read is it needs to reflect the affordability and financial situation. It does not say you cannot or can pay.”*
- It was put to the Claimant that any guarantee for variable compensation had to be in writing, and she acknowledged this.
- The Claimant was taken to her counsel’s skeleton argument, which she had approved, which included a truncated form of the relevant paragraph of the Compensation Policy (see para 17 above) which omitted the full wording referring

to variable compensation being “subject to affordability”. It is unclear to me why those clearly important words were not included in the skeleton argument (the Claimant herself cannot be held responsible) but the Claimant was asked whether she accepted that affordability, according to this policy, was subject to the consideration of affordability. Her response was “*I guess, yes, for all employees.*”

Whilst the Claimant sought to say that she understood that all factors would be considered, this appeared (in part at least) to be a concession that affordability was a pre-condition.

- The Claimant was asked about whether decisions as to individual bonuses depended on a Bank-wide decision about how much money there was in the pool and she accepted that this was broadly how she understood it worked, albeit she had never been part of that decision making process.
- The Claimant said that she had not given any thought as to who made the decision as to allocation of variable compensation, and did not appear to accept that her managers (Dr Sprenger and Mr. Namagiri) could not “create a fund of money out of thin air”; and when asked where would the money come from stated “*From the Bank*”, stating she was just relying on assurances given.

57. The Defendant’s case is that the off-cycle payment made to the Claimant at the end of 2015 and the increased salary of £90,000 per year, represented a retention and incentive policy to ensure that NCOU employees would complete the task of derisking (and be compensated for their work, effectively working themselves out of a job). Approximately 30 people in the NCOU were considered for the retention payment and fixed pay rise. The Defendant’s case was put to the Claimant with care. The Claimant was not aware of how Dr Sprenger was trying to agree a plan with the Bank in 2015 in terms of incentive and retention. She was not aware that a previous proposal of incentivisation was not accepted by the Bank or that a Plan B was adopted. The Claimant received the letter dated 11 December 2015 (at page 583). She accepted that the off-cycle element was described as a “one-off”, and that she signed this letter accepting it. She accepted that the off-cycle payment was £200,000 to be vested in different parts (although did not accept the assertion that this was “substantial”). The Claimant accepted that this off-cycle award was seeking her agreement to work productively up until the date of vesting and that she would abide by that. There was no acceptance by the Claimant that this represented a retention or incentive award to her and other NCOU employees to complete the task and effectively work themselves out of a job.

58. An additional award of salary was made by this agreement, namely a pay increase of almost 30% or £90,000 per annum which was backdated a full year. The letter the Claimant signed stated "This increase reflects the unique circumstances of the non-core operating unit's mandate." The Claimant was asked whether she accepted that this was the Bank's pay-off trying to ensure the loyalty of her as an employee. She stated: "they were paying me so that they can retain me". Nevertheless, the Claimant did not appear to accept that this was reasonable remuneration for her position. The increase in salary meant that the "headroom" for IVC's increased. The legally permitted ratio of bonus to salary at that time was 1:2 (i.e., 2 units of variable contribution to one of salary).
59. The Claimant was asked about the new variable compensation framework introduced by the Bank in 2016. She accepted she would have been aware of this at the time. She was referred to a document called a Reference Total Compensation for 2016 (p797). It is the Defendant's case that this was a benchmark for the total compensation that the Claimant could expect for that year, totalling £425,000. As the Claimant's salary was £390,000 it was put to her that her anticipated variable compensation would be £35,000 (i.e. the difference between the £425,000 and salary of £390,000). It was also noted that this document referred to affordability and that there was no contractual entitlement to receive variable compensation. The Claimant stated that she had not paid any attention to this or the £35,000 figure prior to being questioned in the witness box.
60. Understandably perhaps given the passage of time, many of the Claimant's assertions as to assurances lack particularity or detail. This is evidenced by the Claimant's response (or lack of it) to requests for Further Information. It is the Claimant's case that she repeatedly sought reassurance in relation to her future compensation and career; it is surprising that, if such assurance had been provided in clear and reliable terms, repeated reassurance was requested. The fact that the Claimant accepted that she asked for such to be put into writing rather undermines her position that oral assurances were clear and could be relied upon.
61. In my judgment it is clear that contemporaneous documents (transcript and grievance complaints) do not fully correspond with the Claimant's witness statement or pleaded case as to assertions made, and by whom. Further, whilst I am satisfied that the Claimant now genuinely believes that assurances were given, the evidential basis upon which she holds that belief is problematic. She may have, with the benefit of hindsight, convinced herself that things were said and done. Defence counsel refers to this as "Memory improvement syndrome". It is well-recognised that when people try to recall events that have happened

in the past, particularly with litigation in mind, there is a tendency for memories to get rewritten. The contemporaneous evidence does not fully support the Claimant's position. This means that the Claimant's evidence and her recall have to be carefully weighed against other evidence when determining what assurances were actually given and by whom.

62. Finally, part of the Claimant's case is that there was no explanation given or reasoning provided for the Defendant's decision making as to the lack of individual compensation. In her oral evidence the Claimant accepted that on 18th January 2017 the email communication from Mr Cryan was received by everyone at the Bank. That provided (p1711) details of job cuts, the financial position of the Bank and the fact shareholders were not receiving a dividend. The Claimant believed that this decision did not apply to her and the NCOU but she accepted that this letter explained the reasoning for why the IVC pool was zero. The document at page 1825 dated 8th March 2017 posted on the Bank's intranet explained the rationale and outcome in relation to the group element of variable compensation. The Claimant accepted, although she could not now recall it, that she would have had access to this material. The Claimant's case in terms of lack of reasons being provided was that she individually did not have an explanation as to why she did not get IVC despite the assurances and that as such, she should have been treated differently i.e., the Bank should have taken into account those assurances. As such, the Claimant's case on this point clearly rested on the assertion that she should have been provided with individual reasoning, as opposed to the (accepted) general explanation that was provided.

Dr Sprenger

63. Dr Pius Sprenger was the Global Head of the Bank's Non-core Operations Unit (NCOU) from mid-2012 onwards until his employment with the Bank ended in 2018. He provided a witness statement in which he explained the accelerated closure of the NCOU, and how he prepared a de-risking plan for closure by 2016, including a special incentivisation scheme for the NCOU team. His statement referred to the proposals he had made to the Management Board on 15 July 2015, making it clear that there was a significant hurdle in retaining the NCOU staff and that significant incentivisation was necessary to achieve that. His statement did not, however, state that, despite his wishes, his initial proposals for incentivisation were rejected by the board. At paragraph 24 of his witness statement he refers again to his proposals and was reassured that his superior Mr Krause thought it would be "fine" but it had to be run by HR. That proposal included incentivisation of "a minimum of 4 times multiplier" for an employee designated as essential and multiple of 2.5 for an employee designated as important.

64. His witness statement states (with reference to the period after a meeting in September 2015) *"As I anticipated, the Claimant and other members of the NCOU team were concerned about their career and compensation. I provided them with assurances in line with the discussions that I had with the members of the Management Board. My understanding was that NCOU would receive a significant incentive for this project, and I told them that if they performed well, they would be looked after."* (para.14). His statement confirmed, that when the accelerated closure was agreed on 29 October 2015, HR were tasked with implementing the incentive structure. His statement is silent as to what HR did in that regard from late 2015 to the autumn/winter of 2016. At paragraph 28 of his statement Dr Sprenger stated: *"I reported to Mr Cryan and had numerous discussions with Mr Cryan over 2015 and 2016, where I stressed the importance that NCOU would need to be looked after. Mr Cryan never gave any indication that he did not agree with this, and he never said that NCOU would not receive any variable compensation for the work we were undertaking."* The impression created by reading Dr Sprenger's witness statement is that the proposal for compensation (and in particular in terms of multiples) was made by him, and not contradicted by his managers. In fact, the overall tone is that there was an understanding that this was the agreed position. That was not in fact the position.
65. In terms of the off-cycle agreement Dr Sprenger stated at paragraph 30 of his statement, that this was agreed on the basis of a presentation (drafted by Mr Slater) used at a SECC Business Engagement Meeting for NCOU. *"Those proposals indicated we expected a "(i) base increase of 30% back dated to 1st January 2015; (ii) 10% increase of VC pool to reward over achievement of, KPI targets as laid out in the Management Board accelerated proposal; and (Hi) off-cycle awards to lock in appropriate talent". It was also clear in that presentation that NCOU expected an off-cycle payment for "retention of key personnel during [sic] 2016 (and 2017 where applicable)".* It is of note that this does not correspond with the off-cycle letter sent to the Claimant (and others) which she signed in December 2015.
66. In terms of specific assurances to the Claimant, Dr Sprenger's statement refers to keeping Mr Namagiri (as the Claimant's line manager) updated as to progress on matters in relation to the NCOU incentive payment and Mr Namagiri was aware of the management board discussions on this issue. In respect of direct contact with the Claimant, paragraph 30 of his witness statement states: *"I do not recall the exact dates but do recall that the Claimant raised the issue of her job security and remuneration several times. I do not recall the exact words that I said, but it would have been along the lines that we would have been looked*

after and, if she did a very good job then she would be looked after very well. It was crucial to retain the Claimant as she was a critical member of the team.” And paragraph 37: *“I believe that the NCOU team worked so hard because of the assurances given to them. However, the Bank failed to honour the trust that the employees of the entire NCOU division placed in them”*. He referred at paragraph 38 to not just a general expectation but a well-considered plan that was discussed at the highest level of the Bank, including with Mr Cryan. Paragraph 30 of his witness statement is particularly striking: *“It was my understanding that the NCOU team (including the Claimant) would be paid multiples of their previous compensation packages if we delivered the accelerated closure successfully. I communicated this to the team, including to the Claimant on several occasions as I have explained above.”*

67. Dr Sprenger’s statement then deals with the events at the end of 2016 and early 2017 and states that he still expected the NCOU would be paid a bonus/incentive. Unfortunately, Dr Sprenger’s expectation was not realised. He refers to a contemporaneous note he made after meeting Mr Cryan in the January when he was pleading the special case of the NCOU. Para 53: *“On 7 February 2017, I had a meeting with the Claimant, and I informed her that NCOU would not be receiving any variable compensation for the accelerated derisking. I apologised for this given the assurances she was provided.”* He described this as a *“devastating blow”*. He had no experience of a Bank informing its employees that there would be zero bonus. His sense of disappointment is palpable in the final line of his statement: *“We were tasked with a very unique and special task but were unfortunately failed by the Bank and not paid what had been promised”*.
68. The tone of Dr Sprenger’s oral evidence was somewhat different. It was marked (understandably given the passage of time, but in contrast to his statement made only months previously) by his inability to recall many details of matters that occurred in 2015-17. He struggled to recall quite straightforward issues such as which part of the organisation was responsible for decisions as to compensation. He did ultimately recall that *“I think ultimately it goes up to the management board, the highest authority of the firm, and they work together with HR to determine and allocate bonus pools to various divisions, of which NCOU was one.”* He clearly accepted that he did not have authority or the ability to declare bonuses for his team. As such, he would be careful to avoid making any statement to employees that would legally bind the Bank. He was able to recall this point with clarity.
69. Contrary to the position set out in the witness statement, and when taken to the documents, Dr Sprenger accepted (or then recalled) that his initial proposal for an incentive

scheme, was not one adopted by the Bank. The PowerPoint of July 2015 which contained the proposal (p308) made little direct reference to compensation stating only: "Incentive plan proposed to be paid to NCOU employees (details to be verified) aligned to agreed performance targets". The incentive plan was not discussed by Dr Sprenger at the board, he left it with Mr Krause. There was a proposal made (p2660) but figures within it as to specifics were blank. This was presented to the Management Board in the Summer of 2015. It included a proposal for incentive payments in multiples. The email chain from p356 from Ian Salters confirms this was suggested. The response to Dr Sprenger at p357 dated 16th July 2015 identified a problem with CRDIV restrictions (which limited as a matter of regulation the proportion of bonus to salary ratio). It was put to Dr Sprenger that this proposed incentive plan was therefore "not a runner": he struggled to recall the details but accepted that this was an obstacle to be worked around. As such a "Plan B" was drawn up (p367) which consisted of base pay increases and off-cycle payments for key individuals. Dr Sprenger could not recall if this was discussed with him. He could not recall whether this was his plan. However, he was referred to p369 /270 where an email from Ian Salters dated 30th September 2015 suggested "*(Dr Sprenger) indicated we need some ideas on what could be accommodated as regards incentivisation. As he stated his thoughts are*1. Base pay increases 2. New contracts for the Senior Managers (similar to the present Board Members) 3. Share options/warrants". There is then reference to Dr Sprenger addressing this at a meeting with John Cryan and others on 14th October. By 30 October an email at p458 indicated that Pippa Lambert (head of HR) had looked at another proposal which included a 30% final pay increase and consideration of off-cycle awards. Dr Sprenger did not recall that HR had considered his original proposal as unlawful. He appeared to find it difficult to recall the chain of events generally. He appeared to accept however that the proposal document at p490 was one that would have been put to SECC for the NCOU (which he chaired) in November 2015. That included as a proposal: "*Incentive Requirements: To ensure NCOU retains appropriate talent the following is requested: i. Base increase of 30% back dated to 1st Jan 2015 for essential personnel ii. 10% increase of VC pool to reward over achievement of KPI targets as laid out in the Management Board accelerated proposal and iii. Off-Cycle awards to lock in appropriate talent for remainder of 2016 and 2017 where required*". Dr Sprenger accepted that this was a request and that the decision-making power was vested in the SECC. This "triple ask", Dr Sprenger appeared to recall, but again he appeared to struggle to recall details. However, he recalled the action i.e., the 30% pay increase and the off-cycle award, the purpose of which was to lock in talent.

70. Nevertheless, despite the documentation indicating otherwise, Dr Sprenger's evidence was that his understanding was that at the end of the NCOU there would be an incentive payment. When asked for the basis of that understanding, he based it on the rational nature of Bankers: *"That would be highly irrational to expect that people will say: well, I don't expect anything else in the future, but I keep on working until 2016/2017, and whatever it takes."* He did not refer to any documents or oral expressions from those in authority to make those decision that there would be such further incentives paid. His reasoning was that Bankers would have expected such incentive rather than stating that there had been agreement or assurances that such incentives would be forthcoming. Later in his evidence he appeared to base this on past history, that he had never experienced a year in banking when zero bonuses had been paid, even in years of Banking crisis.
71. Dr Sprenger was taken to the PowerPoint at p491 which he accepted he had (on balance) presented to the SECC, had also made a request for a 10% increase on the VC pool against the previous year. Again, Dr Sprenger could not recall that information contained in the documentation, making the point that this was only a small part of his job. That is understandable to some extent but has to be contrasted with the apparent clarity of his recollection in her witness statement. Dr Sprenger accepted that in 2016 the overall bonus pool for the entire Bank showed a "colossal" reduction in the variable compensation pool (there was some dispute as to the precise figure). In the early part of 2016 (after the "off-cycle" letter was sent out in December 2015) Dr Sprenger accepted there were no further efforts to put in place an alternative or additional incentive programme. He explained that he was focusing on the work of cleaning up the balance sheet, doing the daily job.
72. Dr Sprenger explained to the court that in the summer of 2016 his relationship with John Cryan broke down, he was getting no communication and receiving the "cold shoulder". Proposals were made by Mr. Salters in respect of the bonus pool, with an "ask" of 9.5 million euros (as opposed to the bonus pool actually being that sum, which may have been the suggestion in the witness statement). In so far as this was Dr Sprenger's understanding as to the size of the pool; he was, he said, basing this on experience on working in the Bank and in previous Banks in the past. He accepted that the understanding could not have come from senior management (as he was being "cold-shouldered"). The evidence of Dr Sprenger therefore was that he was basing his understanding on nothing other than past experience. In fact, in so far as he could recall details (which clearly proved to be difficult) he accepted that the contemporaneous documents indicated that what he was seeking in terms of a bonus pool and incentive structure, was not something the Bank agreed to. This is clear on

the basis of the email chain at page 1137 onwards. This email chain within HR was consistent with the Bank's position that there were no completion bonuses to be paid to the NCOU. Whilst Dr Sprenger sought to distinguish between the view of HR and the Bank as a whole, stating he had not heard from Mr. Cryan that there would not be a completion bonus until much later.

73. Dr Sprenger had a meeting with Mr. Cryan on 28 October 2016. The speaker notes he prepared for it at page 1462 covered what was proposed for NCOU staff. The document referred to a request for the bonus pool to remain flat/premium given delivery of targets. There is then reference to NCOU management who "should receive enhanced exit..." Dr Sprenger (again not recalling the detail) accepted that the notes reflected that he was not requesting a completion bonus for the NCOU staff. The request for NCOU management bonuses related to him and other managers, but not the Claimant.
74. The minutes of the following management board meeting on 1st November 2016 at page 1512 confirmed that Dr Sprenger had been a guest at this board, but only for the purpose of his agenda item. In so far as his witness statement may have created the impression that he had been present throughout and that there was a discussion in respect of NCOU compensation, he agreed that this was incorrect. Dr Sprenger suggested that counsel had misread the statement. I do not believe that counsel had done so.
75. It is important in my judgment to note the minutes of that board meeting and the discussion in respect of the VC pool (p1517). At that meeting the board were concerned to ensure "a sustainable approach, balancing the interests of regulators, shareholders and employees. Further analysis was conducted regarding the potential 2016 VC pool and/or retention programme scenarios all under the overriding assessment of affordability". There is then reference to a "small VC pool". When it was put to Dr Sprenger that at that stage (November 2016) he knew there would be a very substantially reduced VC pool, again Dr Sprenger's memory appeared to be weak, but stated "*did I naively feel like everything would be great? No, of course not*".
76. Dr Sprenger recalled that there had been a meeting in December 2016, with Pippa Lambert, but denied that it was clear that there would be no bonus, denying that he had lost his temper. There was then a "deep dive" by Pippa Lambert into the history of requests/assurances as to incentives for the NCOU team, with her response, sent on 17 January 2017, making it clear that the 2015 off-cycle plan had been put in place to deal with retention. Dr Sprenger accepted he did not respond to this by, for example, stating that there had been a prior agreement. He indicated he went to his boss, John Cryan, instead.

Contrary to that, however, the emails between John Cryan and Pippa Lambert indicate in quite vivid terms, that John Cryan did not accept Dr Sprenger's position (p1747). Dr Sprenger disagreed with Mr Cryan's position: "*Mr Cryan at this stage was in clear fantasyland.*" He referred to Mr Cryan's comments as "*another lie*". Dr Sprenger did not contend (when it was put to him) that there was a private agreement for settlement with NCOU but rather said, there was no email saying there would be no further payment. Dr Sprenger made notes for his own purpose after a meeting with Mr Cryan in late January. There is nothing within those notes which would support the position of Dr Sprenger that there had been a breach of assurances by Mr Cryan.

77. In terms of his communication with the Claimant Dr Sprenger's recollection was much clearer: "*No guarantees and promises can be given by employees to another employee at the Bank... I never communicated to staff members quantities, because I didn't know until I got it from senior management that is the bonus pool and that is roughly the allocation. So pretty much, I only I knew pretty much when I was allocated bonus pool, so therefore, I didn't communicate quantities as well*". In terms of communication with the Claimant and other members of the team Dr Sprenger was at pains to point out that no specific assurances were given: "*...people came to me or ask or like what is going to happen, the same style of communications like the firm will like, people are being rewarded according to their work and that is what you should expect.*" That is a rather different picture from that presented in his witness statement.
78. He explained that reward was not necessarily linked with the performance of the Bank as a whole. All communications to the team were oral. "Q: *You would only contemplate sending such a communication in writing if you had something definitive from above to communicate?* A: *Even then I would not. I never did*".
79. I found the evidence of Dr Sprenger to be problematic. I have highlighted the difference between his present recall and that in his witness statement only months ago. I am sorry to conclude that he suffered from the opposite of improved memory syndrome, perhaps conveniently being unable to recall matters which were in conflict with his written evidence. Where there is a dispute between the contemporaneous documents (emails, PowerPoint, speaker notes and the like), and the evidence of Dr Sprenger, I conclude that I have to reject the evidence of Dr Sprenger. I appreciate that he may feel that he has personally been let down by the Bank and his relationship with Mr Cryan. That may have infected his evidence, I know not. All I can say with clarity is that his evidence was weak, and not supported (in fact contradicted) by documentation. In fact, his witness statement was, in my judgment

deliberately misleading when compared to his oral evidence. I note that the only point upon which I could have confidence that he was correct was when he stated that he would not have given assurances to the Claimant, other than in the most general terms. I accept this, because it ties in with the lack of allegation by the Claimant until the point of pleading that any such assertion had been made.

Mr Namagiri

80. Turning to the evidence of Mr Namagiri: the oral evidence was provided by video link and as such was a little more stilted than other evidence before the court. This factor did not significantly impact on the evidence as a whole. Mr Namagiri was employed by the Defendant from August 2001 to March 2018: he was one of the Claimant's managers in the NCOU and reported to Dr Sprenger. His witness statement referred to the acceleration plan for the closure of the NCOU and his expectation that there would be an incentive structure to compensate the team. He generally agreed with the Claimant's case as to what it was alleged had been said to her but could not remember the precise words or dates of the assurances. He based his assurances on what was told to him by Dr Sprenger, and he then reassured team members that they would be paid for performance, having no doubt that the process "would be fair and reasonable". His statement refers to the transcribed telephone call of May 2016 "*I told the Claimant that 2016 would be the blockbuster year, the best year of them all*". Any reference to no guarantees was in respect, he said of the Claimant's future career, not compensation. He told the Claimant not to leave her role earlier. He believed that if the Claimant performed well, her compensation would be significant commensurate with results. Even in January 2017, when the zero-bonus announcement was made, he considered that bonuses would still be paid to the NCOU.
81. Mr Namagiri was interviewed as part of the Claimant's grievance process when he expressed the limitations that he had in terms of control over the compensation process and bonus pool, but still said that he had told the Claimant that he expected she would be treated fairly. He denied, both in his statement and the grievance interview, that he would have said that the Claimant would be generously rewarded for her hard work. He generally would not have used such language but asserted that the message to the Claimant was the better for performance, the better the reward.
82. I have considered the transcript of the grievance interview (as above) which was put to Mr Namagiri in cross-examination. In brief key points of Mr Namagiri's oral evidence was:
- He does not have a clear recollection of those events.

- His memory was likely to be more accurate at the time of the grievance interview.
- He was not part of the team that would decide matters of compensation and he would not know what was happening until “late in the cycle”.
- A proposal for the accelerated proposal of the NCOU was put together by himself and Dr Sprenger which included an incentive to employees and a retention proposal. He would not know what the outcome of such a proposal was. He was not told by anyone that the incentive proposal had been rejected by the Bank.
- Nevertheless, he accepted that the Plan B being developed by Mr Salters was shared with him. A retention plan (the off-cycle award and the increase in salary) was adopted albeit he accepted it was not referred to in his witness statement. He sought to distinguish retention with an incentive plan to get the job done. He could not specifically recall that the original plan had been rejected by the Bank as being unlawful (stating “*I don't recall exactly*”).
- When asked what promises had been made by the Bank, he accepted that they did not explicitly promise anything.
- In terms of the assurances that he gave: “*What assurances were given to you that you're referring to in the first two words of that sentence at paragraph 26? A There was nothing explicit, but nothing was ever said explicitly in my entire time in the Bank.*”
- In January 2017 he knew that the Bank was not going to pay IVC bonuses, having been told by Dr Sprenger but believed this did not relate to the NCOU at the time.
- As to the Bank going back on assurances, he accepted that: “*There is never any assurance ever given in my entire period at Deutsche Bank, no. Nobody ever says things that are- I am not a lawyer, so yeah, there is nothing explicit in the document that will ever hand over.*”

83. Mr. Namagiri was asked about his responses to questions at the grievance interview. He explained that performance was precondition to payments:

“*What did you tell Shikha Gupta?*” Your answer is:

'I told her two things, one make sure you perform; two, I will try and reward you as much as I can, but it depends upon me being given a bonus pool.'

Is that answer accurate?

A Yeah, this is what is written there, so that is exactly what I said at the time, yeah.

Q... So that is right, isn't it, you're constantly saying to her, whenever the topic is brought up: look, I will do what I can, but my powers are limited?

A Yeah, that is exactly what I said. Yeah, this is what I - is written here.

Q And if, for example, there is no bonus pool, it means you can't do anything?...

A Yes, I am at a certain level of seniority".

84. He confirmed that he would only have spoken to the Claimant in a generic way. He agreed that in the interview he had denied using language such as the Claimant being "*generously rewarded*".
85. In terms of the telephone conversations, the transcript of which is referred to in detail above, doing his best to recall what he meant in those conversations, Mr Namagiri stated that *his* reference to a blockbuster year was not a guarantee, but was his expectation. He was unwilling to put any further gloss on that conversation, but seemed to be implying that he expected a further payment when the job was complete.
86. My overall assessment of the evidence of Mr Namagiri is that he was trying to be a careful witness. He was stressing the point that he would have taken care with language; he would have given the Claimant no guarantees, and although he may have had an expectation of a bonus and expressed that to the Claimant, it was not certain, not guaranteed and not in his hands. In my judgment the words he used in the various telephone conversations were similar expressions of hope rather than assurances or promises.

Mr Spaulding

87. The final witness who gave evidence as to the "assurances" was called by the Defendant and was Matthew Spaulding, who was the Claimant's line manager and was Desk Head within the NCOU. Perhaps surprisingly his evidence was the strongest in support of the Claimant's case. That may, however, reflect that he was the most junior of the managers who gave evidence, and he too might have expected a more generous bonus than he in fact received.
88. In his statement Mr Spaulding stated that he held the Claimant in high regard and that her performance was exceptional, albeit her role was not unique. His role as desk head meant that he had little involvement with compensation decisions. His understanding was that Mr Namagiri would undertake the initial estimation of annual variable compensation, based on the available pool. There would be some dialogue with Mr Namagiri as to individual employee's performance, but the final say was with Mr Namagiri. He was aware that bonuses were discretionary and not guaranteed but had limited knowledge of any specific policies in place. He knew that Dr Sprenger and Mr Namagiri were spearheading efforts to gain a bonus pool for the NCOU, and it was his general understanding that, despite the Bank's financial difficulties, "*Mr Namagiri and Dr Sprenger were still trying to get an annual*

VC” However: *“When the speculation around the possible DOJ settlement begun in or around mid-2016, it was recognised that this could very likely impact any bonus pool for the Bank. The details of exactly how it would be impacted only became clear in January 2017, when an email was sent to all Bank staff confirming that a decision had been reached not to pay individual Annual VC to VPs, Directors and Managing Directors. This was a firm-wide decision”*.

89. In terms of alleged assurances given to the Claimant regarding her remuneration, Mr Spaulding accepted that he spoke regularly with the Claimant about these issues, particularly against the background of the accelerated closure plan. *“As a general point, I could not have given the Claimant (or anyone else) a reference to the size of a bonus. Reason being, I was not party to the decisions to be taken about the size of any wider bonus pool and, regardless of what I expected or hoped would happen in the future, I did not have any authority to tell anybody what they would – or would not – receive in respect to Annual VC. Given the Claimant’s seniority, she would have known that I did not have that authority.”* He stated that the Claimant should know that managers did not control the bonus pool. He stated that if the Claimant had been given a guarantee or sufficiently clear assurance, she would not have brought the issue up as frequently as she did. He accepted that there were many conversations, but this reflected the *“inherent uncertainty around the situation”*.
90. Mr Spaulding accepted that he would have told the Claimant that he expected those still employed at the date of the closure of the NCOU would be rewarded, but neither expressly said nor intimated that reward meant any sort of guaranteed remuneration. There was a general expectation that employees in the NCOU would get bonuses similar to previous years: but that was based on expectation alone, not guarantee. He disagreed that he said she would receive *“more than ever”* or *“a multiple”* of previous years. The Claimant *“and the rest of us”* sought assurances in writing. *“We wanted this condition in place but the Bank was not willing to give it”*.
91. Mr Spaulding, like the Claimant and Mr Namagiri, had a near contemporaneous transcript from his grievance interview. dated 5 April 2017. I note that in the interview he stated:
- *“So, during the year assurances - verbal assurances - were made to the team that we would be looked after... the track record had been that the unit was looked after and if we delivered - and that was the big if - if we delivered in 2016, we would be compensated in line with what we had seen in previous years. That is the message that was communicated to me by Srini[?], who’s my direct line, conversations that*

I've had with Pius [Sprenger], which was Srini's boss. And that was what was cascaded to the team, and you can imagine, if you didn't make those assurances to the individuals, why would an individual work through the end of the year? If they knew in March that end of the year that they weren't going to get paid, you would start planning to leave... It was always caveated on you have to deliver; you have to deliver; you have to de-risk. There were targets that needed to be hit before the end of the year. It was always conditional on if you basically achieve our target you should expect to be looked after. It was never said in a way that there was a zero probability of something happening, but more likelihood than not, you expected to be treated as you had been in the past. And that was the message that went to the team...".

- *"Your job as a manager was to, falling short of providing guarantees, say, 'Look, these are the risks of working in the organisation but, to the best of our knowledge, we expect you to be looked after'."*
- *In terms of whether any specific assurances have been given: "We never knew. We never knew. The broad-brush was numbers that people had seen at the end of 2015 were a good benchmark for what they could expect to receive at the end of 2016 on the proviso that they had met the targets."*
- *In terms of off-cycle-awards he stated: "I think it was earmarked to the higher-risk employees - higher-risk meaning those individuals who had left or if they had left we would have failed to meet our de-risking targets... So the notion of being paid an off-cycle adjustment I don't think was interpreted by anyone as saying, 'Alright. That's adequate.'"*
- *"Srini had always said, 'We should be looked after'. And I use the word 'should'; it was more of a 'should' rather than a 'will'. We should expect to be looked after."*
- *"...there was at least a question that was asked as to whether or not the compensation for the staff in terms of the variable comp needed to be in lockstep with the rest of the organisation or whether or not it was a separate process... Throughout the year the feedback that we were getting back from the COOs was that there should be no inconsistencies, meaning if somebody wanted to come up with different kind of pay out package, a golden parachute, whatever it may be, it was made clear to us that that route was not going to be taken. So, the only way you were going to get paid was through a bonus".*
- *In terms of the decision in January and the communication of it:*

more. *"I think what's still happening is individuals were still just angry. It was nothing*

than that. The group component was a mathematical calculation that everybody was comfortable solving on their own. The question was what was clearly missing was the individual component and that was zero. Whether she had heard the zero from Peter or whether she had heard it from me, it wouldn't have healed her pain anymore, so...No. No. No. People were deeply, deeply upset. People are still upset if they feel mistreated. I'm fortunate - The only thing I would say is I think the - just as a recommendation to the organisation - I think they should take steps to minimise the ambiguity in the sense that ..I think if you - there were better ways of the organisation, basically, dealing with [inaudible]."

92. I say at this point that I do not find the explanation given by Mr Spaulding in the grievance interview to be particularly easy to follow. He accepted that in this oral evidence. There certainly appeared to be a level of hindsight providing greater clarity in his position when it came to providing his evidence to the court. He was unable to say whether the Claimant would have left the NCOU earlier had she not been provided with assurances: *"I don't [know], I didn't have that view"*, whilst accepting that individuals could have made arrangements based on assurances.
93. He stated that assurances were based on the expectation that the NCOU team had. In part this was based on the fact that he believed that Dr Sprenger had a line of communication with the most senior people in the Bank and (although didn't speak with specific authority) he would not be ill-informed. However, Dr Sprenger: *"... he is not giving me a promise or guarantee of what I expected the compensation for myself or the team to be for 2016". "I think the Claimant had an expectation that she should be looked after, and that- that is what I was trying to say here (in the grievance interview). I also had the expectation that she should be looked after... I am just prefacing this that there was a bit of an uncertainty here... what I am trying to say here is that it wasn't all within our control..."*.
94. In terms of the team's expectation he states: *"Well, I think when I say "more doubtful", I don't think it is an absolute statement. The team did not believe that the only uncertainty was whether or not we would achieve our targets."* In terms of that statement potentially being at conflict with what he had said in the grievance interview he stated: *"I would say that this is unfortunately not the best usage of the English language that I would have chosen"*.

95. My interpretation and understanding of Mr Spaulding's evidence is that the team at the NCOU had an expectation, engendered by: (i) what had happened in previous years, (ii) the fact that they were not told to expect anything different and (iii) the fact that they were working hard to meet a target which would put them out of a job. That expectation was that they would get a bonus, but with no guarantees as to amount. *"So it is not necessarily a case that people were saying, definitively, we are going to get paid. We had no information that that basically was contrary to the expectations that I would say that the group as a whole had... and were highly confident that we were going to receive a VC leading up until that period and that expectation of being - of receiving a VC was not met and people were very disappointed.*

Q Yes, do you take issue with my characterisation of this being a monumental sense of betrayal on the part of the Bank?

A I would say certain individuals probably thought that.

Q Yes. Would you include the Claimant within that?

A I think I would.

...It was, again, an expectation we all had and you can still be very disappointed if your expectation is wrong. And that is the case for the people in the group."

96. The impression I formed is that Mr Spaulding's evidence is that individuals in the team had allowed themselves to believe that there would be a VC, which led to huge disappointment when it was not paid. However: *"I don't think it's a case of being let down by the Bank. There were multiple factors that were associated with how individuals thought they were going to be paid. First and foremost was that you had to deliver... But again, as I mention in this, you know, previous statement, there ... was never an expectation that we would be paid only on delivering. There were other uncertainties involved...Without a doubt, delivery was the one that was the most discussed because it was within our control. But ... you didn't operate in a vacuum in thinking there weren't other considerations... I mean, to be fair, you could look at Deutsche Bank's stock price every day, during the time, and it gave you an indication that things were not safe".*

97. Mr Spaulding was, in my judgment, at pains to point out that despite expectations, there was never a guarantee, assurance or promise of a VC bonus. In my judgment he was a balanced witness, trying to do his best. He was more than willing to accept that the Claimant was a star performer on the team.

Ms Lambert

98. To be balanced against the evidence of the “key players” in the NCOU there was background information provided by other individuals in the Defendant’s employ, and in particular in the Human Resources field. Philippa (Pippa) Lambert was, at the relevant period, Global Head of HR. In her first witness statement she explained how the bonus system worked, explaining the individual and group elements of variable compensation and the off-cycle awards (which were all discretionary). Reference Total Compensation (RTC) was introduced in 2016 and set out the notional amount of compensation including fixed pay and variable compensation that an employee might anticipate receiving for a particular performance year when all eligibility conditions and performance expectations at all levels have been satisfied: it was intended to be an orientation number, although an individual’s actual compensation could be higher or lower than that sum.
99. In terms of the Claimant’s contractual position, she stated that the Claimant had a standard template contract of employment which reflected that variable compensation was discretionary. This she states is reflected across a raft of documentation including the Claimant’s contract of employment, the employee handbook, the Compensation policy, the compensation authorisation policy, and the compensation strategy. Her position was that all variable compensation was discretionary and dependent on its affordability to the Bank.
100. Since the Global Financial Crisis, standards and regulations in respect of bonus payments have changed. The management board had ultimate responsibility for setting compensation, but a second tier was the supervisory board which supervised the management board. In terms of regulation the Capital Requirements Directive (the “Directive”), to which the Bank was subject, imposed limits on the design and the overall level of VC the Bank could award to individual employees. The Directive established a ratio between fixed and variable pay. For the category the Claimant fell into (“material risk takers”) this ratio was 1:2 salary to VC.
101. The decision-making path for bonuses was that the SECC (Senior Executive Compensation Committee) upon which Ms Lambert sat, would review the performance of business units and the Bank as a whole. It would benchmark against other Banks, consider new regulation, risk factors and other relevant matters. It would make recommendations to the management board about the size of any VC pool. The SECC’s starting point would be the affordability of any proposed pay out; group affordability was the overriding consideration. She explained how the Group and individual VC would be calculated “*provided that creation of a bonus pool was considered affordable*”. Once the pool had been dealt with by the SECC then Divisional Compensation Committees would determine sub-pool allocation (within the divisions themselves).

102. In terms of the NCOU Ms Lambert explained that the decision was taken by the management board during 2015 to accelerate its closure. She had been approached by Mr Krause with proposals for retention arrangements for various members of the NCOU (these were the proposals referred to by Dr Sprenger). The original proposals were, she states *“unworkable (and indeed illegal)”* as the ratio of salary to VC proposed was not compatible with the Capital Requirements Directive. There was ongoing dialogue which recognised that the accelerated wind down of the NCOU gave rise to a retention risk around key employee. She stated that, accordingly, to mitigate that risk she (and other key stakeholders) approved NCOU specific awards which were approved salary increases and various off-cycle payments. The Claimant was one of the employees to receive this: this was the proposal contained in the letter referred to above received by the Claimant which she signed in December 2016 backdating her salary increase of £90,000 p.a. and including staged off-cycle awards. Further retention proposals would have been considered but they would have needed to be put forward to consider on merit.
103. In 2016 a new compensation framework was put in place across the Bank; this introduced the Reference Total Compensation and split the Variable Compensation into Group and Individual elements. She explained how the decision was reached to set a bonus pool, evaluating proposals against the Bank’s performance plan as well as attrition numbers and other strategic initiatives. Eventually the bonus pool for the year in question was considered, over several quarters, reflecting the Bank’s net revenues having been substantially reduced. She states *“At or around this time, the Bank was in a precarious financial position. In discussions at the SECC, our focus was on ensuring the safety and continuation of the Bank a viable business. That required us to preserve the Bank’s capital position and ensure we had the right people to ensure that the Bank could recover. Our concern was that if the wrong people left, and if enough people left, the Bank could go under”*. The Bank’s share price hit an all-time low in September 2016. Further, there was widespread press speculation about the size of a penalty the Bank was going to receive from the US Department of Justice. There were regular discussions with the regulators as to the Bank’s solvency.
104. Ms Lambert explained the decision-making process in respect of setting the bonus pool against this background. If a zero pool was adopted, and no-one received any bonus, there was a fear that key people would leave. As such, a minimal VC pool was considered. A position paper was drawn up by Stuart Peel in October 2016, which outlined the Bank’s struggle with the affordability test. This highlighted the balance that had to be struck, with 3 different scenarios being considered. In November 2016 the Bank engaged with the

European Central Bank as one of its regulators, seeking support for one of these: its bonus retention scenario. These retention provisions did not include the NCOU which was in any event working towards accelerated closure. The reasoning included that there were already existing retention arrangements for the NCOU in the form of the Off-Cycle awards made in December 2015 for relevant NCOU employees, which still had large unvested sums to be paid out. Further the NCOU employees were not considered essential to keep the Bank alive: their role was to limit losses. As such, the proposal for retention bonuses did not include the NCOU. Ultimately in November the Board decided in principle to accept the proposed structure for discretionary compensation with a limited VC pool and targeted retention. This decision was postponed until January 2017 given that settlement with the Department of Justice had not been agreed. In mid-December 2016 the Bank reached a settlement with the DOJ for a USD 7.2 billion settlement. The Bank's affordability assessment was reconsidered. In mid-January 2017 it became clear that the ECB was not going to veto the Bank's proposed retention arrangement.

105. The decision was therefore made that the Bank's most senior employees (those with corporate titles Vice President, Director and Managing Director) would receive only Group VC but not Individual VC (subject to any binding contractual commitments such as collective labour agreements which were honoured). The Group VC was to be paid out at target achievement rate of 50%. Retention awards would be paid to a limited number of employees with crucial positions for the further success of the Bank. This decision as a whole meant that the Claimant, who held a director post, would only receive the Group component, no IVC and no further retention payment (over and above that agreed in December 2015 still to be vested).
106. As a whole the VC pool for 2016 amounted to Euros 0.5 billion, a decrease of around 80% from the previous year. 75% of employees were not affected (or only minimally). The Bank's decision-making rationale is fully set out in Ms Lambert's first statement. Central to the reasoning was the Bank's financial position and the issue of affordability. The Bank did not give any serious consideration to a very small IVC pool because this would have involved very low awards to individuals relative to expectations. Further, this would not have put money into the hands of those that the Bank could not afford to lose. A much smaller Group VC pool was, by comparison, affordable. The appropriateness of paying this, rather than individual VC was considered, and the Group VC was considered to be fairer, the alternative may have disproportionately hurt more junior employees.

107. The retention arrangements were considered by Ms Lambert to be comparatively affordable, being a significantly lower financial commitment, and were future promises of payment if certain conditions were met (and hence not “booked” against the Bank’s 2016 profit and loss figures.)
108. A further consideration in the decision as to IVC was the input from the Bank’s regulators. The Bank was making a loss, yet again and the starting point from the main regulator was that the Bank should not be paying any IVC. Ultimately the regulator accepted the Bank’s argument as to retention, and the regulator accepted the principle proposed.
109. In terms of the individual position of the Claimant Ms Lambert states: *“For the avoidance of doubt, I can confirm that I cannot recall any discussion of any individual employee’s circumstances or performance (including the Claimant), or the alleged unique position of any individual division of the Bank, when the Bank made its decision (not to award an Individual VC pool for the 2016 PY).”*
110. It is clear that the decision was not happily received by Dr Sprenger. Ms Lambert refers to Dr Sprenger’s lobbying on behalf of the NCOU during 2016. In an email exchange Ms Lambert had made it clear to Ian Salters that she was not keen on doing more than the Bank had already done for the NCOU by the off-cycle payment plan in December 2015. In mid-December 2016 Ms Lambert states she was approached by Dr Sprenger, who said there should be a special incentive plan for the NCOU. Ms Lambert did not agree with Dr Sprenger’s perception that the NCOU were in some way special or had saved the Bank; *“They performed an important function for which they were rewarded. They were not however, revenue generators”*. In mid-January 2017, Ms Lambert became aware of efforts by the NCOU and Dr Sprenger to secure “special treatment” for NCOU employees. An email chain between herself and the CEO John Cryan makes it very clear that neither Ms Lambert nor Mr Cryan accepted that there had been any arrangement for this, nor should there be: Mr Cryan described this as *“complete fantasy”* and was less than complimentary in his description of Dr Sprenger (referring to him, in vivid terms as an *“unreconstructed and greedy trader whose only interest is his own”*).
111. In her second witness statement Ms Lambert addresses issues raised in the statements of the Claimant’s witnesses. She confirms:
- The proposal formulated by Dr Sprenger and Mr Krause for an incentive framework for the NCOU was not permissible under the Capital Requirements Directive and this was confirmed and discussed with the NCOU in the summer of 2015 (she exhibits the relevant emails confirming this).

- Reference by Dr Sprenger to off-cycle awards in 2016 refers to the NCOU specific awards made in December 2015.
- The Directive does not permit guarantees to existing staff.
- When Dr Sprenger referred to the size of the total variable pool in his statement, that was reference (in 2016) to an “ask”, not fixed but a proposal only.
- Although Dr Sprenger came up with proposals for incentivisation and remuneration, he did not make decisions in respect of these.
- Although Dr Sprenger referred to meetings with Mr Cryan late 2016, the emails from Mr Cryan (p1747 January 2017) indicate that, from Mr Cryan’s perspective, there was no agreement for a special treatment or bonus pool for the NCOU.
- Although, upon a reading of Dr Sprenger’s statement, it might suggest that he was present at the Management meeting on 1st November 2016, he was in fact only there as a guest for his agenda item.
- On 14 December 2016 there was a meeting between Ms Lambert and Dr Sprenger: Dr Sprenger was aware that it was very likely that there would be zero individual VC for Bank employees for 2016. She recalled telling him that NCOU employees would be treated the same as the rest of the Bank and Dr Sprenger lost his temper: it was at that point that he referred to a special incentive arrangement agreed for the NCOU in 2015. As she did not know about any such agreement, nor had anyone else in the Bank spoken to her about it, she felt it important to review the documentation he said supported such a special arrangement. The documents Dr Sprenger presented were the PowerPoint presentation (p1610/308) which she reviewed and concluded that this document did not support the assertion of a special arrangement: “*It was an unspecified proposal and nothing more*”. However, Ms Lambert made enquiries and sought clarification. It was confirmed to her that no special incentive arrangement for NCOU had been agreed. She confirmed this with Dr Sprenger in an email on 17 January 2017 (p1814). Dr Sprenger did not reply (I note in oral evidence he said he would not reply to HR but would take it up with Mr Cryan).
- In respect of Mr Namagiri, his statement that there would be an expectation of variable compensation of “*equal or more than the sum of the total compensation they would otherwise have earnt over the next four years*” is, she says misconceived.

112. Ms Lambert was extensively cross examined. She impressed me as a careful witness with a keen eye for detail who was willing to accept reasonable propositions put to her and make sensible concessions. She accepted that a responsible employer has a duty to be transparent

and fair in its dealings with employees. She explained that sometimes employees have unrealistic expectations which needed to be managed. She explained that a number of factors would always need to be considered in terms of expectation, including what had been communicated, by whom and whether it contradicted written guidelines. Information can change. Pay, she accepted, was an important part of any employment relationship, but not necessarily the predominant factor.

113. She accepted that the employment contract set out the obligation for pay and stated that individual VC would be discretionary based on a number of factors as set out at paragraph 7.2 of the contract. This paragraph, she accepted, did not explicitly refer to affordability. Further, the employment contract did not refer to the bonus pool. She accepted the principle that in certain circumstances the Bank could pay compensation falling outside the employment contract (for retention) but that is all subject to the legal restrictions in the regulations (CRD IV) and the regulators (being the German regulator and the European Central Bank). Whilst Ms Lambert accepted that the contract referred to personal performance as a relevant consideration, it also referred to the performance of the Bank and the business unit. When asked if the Bank had to take into account “all of these factors” when making the decision as to VC she agreed (albeit it is accepted that this a matter of law for the court to determine).
114. In terms of the Reference Total Compensation Statement Ms Lambert explained this was an “orientation” as to total compensation, but actual VC could be above or below that. Employees had that information explained to them by guidance notes on the intranet and there was an explanatory video too. There was also managerial guidance as to this. She explained that there was a change in position in relation to bonuses and this document was introduced to manage more realistic expectations in that regard.
115. In terms of the issues to be considered pursuant to the employment contract Ms Lambert stated: *“Well, I am suggesting that the Bank takes into account what it needs to take into account in order to discharge its duties, from a regulatory point of view, legal point of view, and a fairness point of view, in determining variable compensation. But not like willy-nilly does what it likes ignoring all those factors.”* She accepted that the off-cycle award fell outside the discretionary incentive award (they are covered separately in the compensation authorisation policy). She was clear in her position that affordability was the critical consideration *“because without the affordability, the other things sort of fall away”*. She accepted that in the contract itself, although performance is mentioned, it does not expressly state it comes first as a consideration. The Employee Handbook, it was agreed,

forms part of the employment contract. The employment contract did not refer to the compensation policy and strategy. Ms Lambert stated those documents did not just describe processes that were applied but also the regulatory framework against which decisions had to be made. She highlighted the reference to discretion within them. It was put to Ms Lambert that the handbook does not suggest that there was a 2-stage process, with a bonus pool having to be set. She stated that this was implicit in consideration of the reference to "company performance". She stated that the pool is determined by company performance, its profitability and its capital. Deutsche Bank did in fact operate a pool or pools.

116. Ms Lambert was asked about whether individual circumstances were to be considered: "Q *The individual compensation system must take into account individual performance contribution conduct, et cetera. That is right, is it not? A: Yes, that is correct.*" She did not agree with the assertion that of the objectives and consideration none overrides the others. Compliance with regulations clearly overrode other factors. Further, shareholder interest/profitability had to be prioritised. "Again, nothing is in this document that suggests a priority. However, I still believe it is reasonable for the reader to take an implicit understanding that sustained firm wide profitability is the next priority. Because without it ultimately... because there is the word "sustained" there as well... the Bank falls apart. Shareholder price, share price falls and potentially you're in a dangerous situation and then the whole Bank doesn't exist, and you don't get a salary, let alone a bonus."
117. Ms Lambert accepted that the various compensation policies were silent in terms of reference to a pool as the first stage of declaring IVC. There is reference to a Group VC pool, however. She referred to wording about "group affordability" indicating that it was reasonable for a reader to conclude that, if there was no group affordability, there would be no VC pool. Ultimately, in respect of this line of questioning, Ms Lambert maintained the Bank's position that if a substantial bonus pool was simply not affordable, (or contrary to regulators' approval) it was not open to the Bank to set a bonus pool.
118. In 2017 the Bank made a commitment in terms of bonuses of Euros 1.8 billion: the Bank did not make a profit that year. On accounting principles, some of the VC pool would be deferred as it was vested in subsequent years: the cost was spread over a period of time. There was a drawdown of capital, but only a small portion of the bonus pool figure. It was accepted in principle that the Bank could meet its compensation commitments not only from profits but also capital reserves, it being suggested to the witness that the individual commitment to pay the Claimant a VC as she said she had been assured, was not unaffordable. Ms Lambert did not accept that as a proposition: "I don't believe that you can

agree to pay a single employee who does not have differentiating factors. For example, a guarantee or some kind of written agreement without considering why you wouldn't be doing that for other employees. So, I don't believe that you can make that decision individual by individual" Further, even if the Claimant had been in a different position (hypothetically) the different relative position would have to be approved by the regulator *"I am saying that the European Central Bank was in a position to prevent the Bank from paying a bonus pool and those retention awards without their prior approval. And there are cases when they exercise their rights on an individual basis... Q Yes. So it could do that on an individual basis, but you're not saying that it is, in fact, involved in every single individual decision, are you? A No, it is not involved in every individual decision, but it is involved in whether or not bonuses were permissible and retention awards going forward were permissible in that instance. And that is a matter of record which is in my documents"*.

119. Ms Lambert described the decision as to treat the Claimant different from other employees (in terms of affordability specifically) as an issue of fairness and consistency. Essentially, the Claimant's case was put to Ms Lambert that, on an individual basis, all factors should be considered, and affordability (in respect of her VC) could not prevent any payments being made. Ms Lambert was unwilling to accept this as a matter of principle. She explained that there are many occasions when individuals say they had been told in verbal communications that, for example they may get a promotion, a move, all sorts of things. *"I can think of multiple situations where people have said they have been told something and it hasn't been what the Bank ultimately did, and we didn't actually do what they wanted. So it's a very general hypothetical case, but I would say the starting principle was a verbal conversation would not form the basis of a reason to do an action. I think there would have to be other circumstances there...I am not saying that under no circumstances would they be considered. They would form part of a decision in the round."*
120. Ms Lambert was asked what the point of the grievance procedure was if it would not result in a different outcome for the Claimant (i.e. personal assurances would not be considered). She explained that the process was also to ensure that managers behaved appropriately. All outcomes were, however, possible, including a conclusion that if assurances had been given this could be a factor as to fair treatment of the Claimant. As to who would, in theory have made a decision as to the Claimant's position if personal assurances had been given and relied upon, that decision making role would have been someone delegated by the management board. It is not clear to me that the outcome of that line of questioning was a concession from Ms Lambert that the grievance procedure could have resulted in bonuses

being paid, even if assurances had been given, but that this would be a factor to consider. It is to be recalled that the outcome of this grievance procedure was that there was a finding that no assurances had in fact been given to the Claimant.

121. The Claimant's case was put that the Bank could have collated personal information, such as alleged assurances, to be taken into account in the decision-making process. Whilst accepting that it was theoretically possible to come up with such a system, in practical terms it would not be workable: *"you would be relying on a manager's memory to record every verbal conversation they had ever had with an employee that could possibly have had an impact on their thinking about compensation...you are also asking the manager to sort of second guess what the employee is thinking about this. Unless the meeting was clearly headed, "Compensation and only about compensation." I don't think a manager could possibly record that."* This was in the context, Ms Lambert stated, of an organisation of 100,000 employees.
122. Overall, the assertion was put that the Bank had to consider all relevant factors in reaching a determination as to the VC to be paid, with no overriding consideration of affordability. Ms Lambert stated: *"No, I disagree. Because I make it- by having an overriding consideration, I therefore agree that there were more than one, but it was the overriding consideration and particularly in this instance."* My reading of that comment and her evidence overall was that affordability for the Bank remained the overriding consideration. It was suggested that it needed to be considered alongside other factors, and then everything should be weighed (i.e. it was a matter of weight): Ms Lambert said *"Yes, that is the approach. Although when you ask me about whether affordability is one of a range of factors, this makes clear it is the first factor and others follow from it."* She accepted it was a matter of sequencing. Again, this, in my judgment, is a legal issue for the court to determine.
123. Finally, in terms of group affordability, Ms Lambert was referred to the Key Operating Procedure; she stood by her position that group affordability was the overriding consideration for VC pool decisions.
124. I found Ms Lambert to be a very careful and considered witness. As stated, she was willing to make proper concessions but was not, ultimately persuaded, despite skilful cross examination, that the Bank's position had been unfair. She carefully analysed and explained the decision-making process in the Bank. She explained the context in which the relevant compensation decisions were made. I do not take from her evidence that she was making any concessions that the Bank's approach to this determination was wrong (even if she had done so, ultimately this a matter for the court to determine). She was a very persuasive

witness upon whom I can place significant reliance. In so far as she sets out the decision-making process, I have no hesitation in accepting her evidence, supported as it is by many documents. In so far as her evidence conflicts with that of Dr Sprenger (in relation, for example to any special arrangements being in place for the NCOU, or any assurances that there would be, over and above the December 2015 off-cycle letters and payments) I unhesitatingly accept the evidence of Ms Lambert.

Mr Peel

125. The Defendant called Mr Stuart Peel who is still employed by the Defendant as Managing Director and Global Head of Performance and Reward. In his statement he explained how the Bank rolled out its VC framework for 2016, including how the methodology was reviewed and refined. An assessment of group affordability had to be made first, to determine any annual VC bonus pool. He explained what was meant by “affordability”: Affordability is comprised of two parts: the first is that the Bank must have strong capital and liquidity (the “Affordability Test”) and the second is that the Bank must be profitable (the “Net Results Test”). Together, these tests are designed to ensure long-term sustainability for the Bank, by which it is understood that, in future years, e.g., 2 years (this was later extended to 5 years, after the period relevant to this claim), the Bank’s capital and liquidity would still be sufficient. *“Affordability is calculated by the Senior Executive Compensation Committee (“SECC”) ... The SECC conducts the affordability assessments and makes recommendations to the Management Board accordingly, i.e., as to the appropriate size of the annual VC pool based on the affordability assessments undertaken”*. The process is described in detail which I note but do not need to refer to further. In terms of the individual VC component, this is determined by the SECC and divided among the Bank’s 5 divisions *“Provided the affordability assessment deemed it appropriate to award an Individual VC pool...”*
126. In 2016 the Bank’s performance was *“very poor and it was performing below expectation”*. In the middle/end of 2016 it was envisaged that there might be some recovery measures taken. Mr Peel refers to the Group affordability table presented to the SECC in September 2016 and onwards. Mr Peel and Ms Lambert put together an affordability paper in October 2016 outlining issues of affordability. The scope of a possible retention programme and 3 possible scenarios for the VC pool. Ultimately, as set out in Ms Lambert’s evidence the management board adopted option 3 which was a limited annual VC pool and targeted retention (to a very limited employee population considered crucial for the further success of the Bank, not including anyone in the NCOU), which needed approval from the regulators.

Mr Peel confirmed that he did not recall any discussion during 2016 regarding a difference in VC treatment for the NCOU, not regarding the Claimant specifically. Mr Peel's evidence in cross examination was very brief and largely unchallenged.

Ms Dave

127. The final witness for the Defendant was Ms Dave, part of the HR team who was involved in the grievance interviews. Her role was shadowing another who has subsequently left the Bank, and to assist. She obtained the Claimant's compensation data in advance as to how she had been treated in relation to other NCOU employees. She confirmed that, in so far as part of the Claimant's current claim is reliance upon assurance alleged to have been made by Dr Sprenger, she did not recall that forming part of the discussions with the Claimant. The outcome of the grievance was that none of the evidence collected (which included data, correspondence, interviews, and anything presented by the Claimant) suggested that there were "clear unequivocal assurances made." The grievance was not upheld: p2553 of the bundle contains the communication of the outcome to the Claimant. The Claimant did not appeal the decision: *"In summary, you had no contractual entitlement to any variable compensation and/or off cycle award, as these are paid on a discretionary basis only and without guarantee. Further to that, the Company does not find any evidence that you were given verbal promises or guarantees in regard to any variable compensation and/or off cycle award."* Specifically, in relation to the assurances the Claimant alleges, it was held: *"The Company note that both Srimi and Matt's accounts of conversations were aligned in that they expected NCOU would be treated fairly, looked after, and compensated as they had been in the past, but they were both clear that no guarantees were made. Whilst Matt said he was given "assurances" regarding compensation, he was very clear that these were not guarantees"*. I note of course that I am in no way bound by any findings that were reached in the internal grievance proceedings.
128. In cross examination, it was put to Ms Dave that Dr Sprenger ought to have been interviewed as part of the grievance as he was bound to be a relevant person (presumably as a suggestion of procedural unfairness, but this is not entirely clear to me). Ms Dave, whilst making it clear that the decision who to interview was not hers, nevertheless supported the decision not to involve Dr Sprenger. Although he was mentioned by the Claimant, he was not identified as a person who had made assurances. Although Mr Spaulding mentioned him as someone who reported to Mr Cryan, he was not relevant for the grievance because the Claimant did not make any assertion that he had made assurances. References to the

Claimant referring to Dr Sprenger in the interview are very brief as set out above. I do not accept that this could reasonably be interpreted as allegations that Dr Sprenger had himself made assurances to the Claimant. Ms Dave made it clear in her evidence that the Claimant did not say, when asked if there was anyone else to speak to “Yes, Dr Sprenger”. Any reference by the Claimant to Dr Sprenger in the grievance interview was, said Ms Dave, only in the most general terms. Having read the grievance interviews in full, and the letters preceding them, I agree with Ms Dave’s interpretation.

The alleged absence of evidence

129. That concludes the analysis of the evidence. What of the evidence I did not hear? The Claimant’s position is that the Defendant had been selective in the evidence called. It is said that the Defendant has not called witnesses referred to in the Particulars of Claim namely: John Cryan, former Global CEO; Stefan Krause, former Global CFO and Ian Salters, COO of the Division and the court is invited to draw adverse inferences from this. It is said that these individuals were the relevant decision makers in respect of the compensation decision. It is suggested that pursuant to ***Wisniewski v Central Manchester Health Authority [1998] Lloyds LR (Medical) 223*** at 240 per Brooke LJ I should draw an adverse inference against Mr Cryan (with whom Dr Sprenger disagrees as to assurances given). Further the failure of the Defendant to call evidence from a decision maker on what would have happened on the counter-factual i.e. if all factors had been taken into account, and not merely the issue of affordability, it is said, should be held against the Defendant when the court ultimately determines the question of what the reasonable decision maker would have determined. It is clear from ***Wisniewski*** that the court is entitled to draw an adverse inference from the absence of a witness, to strengthen the evidence by the other party, but there must have been a case to answer on the issue. I am not provided with any specific reason why those witnesses are absent. The Defendant reminds the court that there is no property in a witness, and the Claimant could have called those witnesses, particularly if the issue is the counter factual: the “what if the other factors had been considered”.
130. In closing submissions on behalf of the Defendant it was contended that there will always be gaps in the evidence, given the passage of time. The court just has to do its best. I agree with that, generally, But I note that the Defendant is seeking to rely upon emails and other documents with the names of those potential witnesses upon them, without calling witness evidence in support. It has, of course, all to be considered in the round in assessing the reliability and credibility of witnesses. If I had to make determinations on the basis of things

which may have been said e.g., between Dr Sprenger and Mr Krause, or Dr Sprenger and Mr Cryan, and there was no other evidence, I could legitimately consider drawing an adverse inference from their absence and it would add weight to the evidence of Dr Sprenger. In this case however, there is a significant amount of other evidence, including emails and contemporaneous documents which fall to be considered when I am weighing and evaluating the evidence of witnesses. The absence of evidence from particular potential witnesses is taken into account and it may on occasion strengthen the Claimant's case. However, other evidence which points the other way has to be weighed up and considered too. In terms, for example, of Dr Sprenger's various proposals, the audit trail of documentation is such, combined with his lack of recollection in the witness box, that any potential adverse inference to be drawn from the absence of other witnesses is extinguished. That is the approach I take.

131. It is said that the decision-makers are not present to explain what weight would have been given to all factors had all relevant factors been considered. In this case, the decision makers who set a zero IVC for the Claimant (and all others who held the affected corporate title) was a line of committees within the Bank. Had personal circumstances been considered relevant, it is correct to say that neither side has adduced evidence of what would have been the decisions. In those circumstances, the court will simply have to do its best in determining what a reasonable decision maker, taking into account all relevant factors, would have determined in the circumstances as they existed at the time.

Analysis and findings

132. The first issue for me to determine is whether the Claimant was given the "assurances" which she says she relied upon. That is a factual determination. If I conclude that assurances were made, were those assurances, along with the other alleged special circumstances of the NCOU and performance, factors which ought as a matter of law have been taken into account? If so (and the Defendant accepts that these matters were not in fact taken into account), is the decision void? Is it a decision which did not take into account all relevant factors pursuant to **Wednesbury** limb 1?
133. The next issue, is the decision an irrational one pursuant to **Wednesbury** limb 2?
134. If so, what would the decision have been had all relevant factors been taken into account?
135. It is accepted that the weight given to different factors is a matter for the decision maker; the court should not look at this with too close a scrutiny. It is accepted by the parties that it would be open to this court to determine that, had the Defendant considered all relevant

factors it could give little weight to factors other than affordability, and as a result it could determine that the Claimant's position would be no different i.e. no further award of bonus. Of course, this is not a route the Claimant presses upon the court.

136. I recognise and accept that in Clark v Nomura plc [2000] IRLR 766 (Auths/4), Burton J at [40] said:

“ Of course, if and when the court concludes that the employer was in breach of contract, then it will be necessary to reach a conclusion, on the balance of probabilities, as to what would have occurred had the employer complied with its contractual obligations, or, as Timothy Walker J put it in Clark v. BET plc, assess, without unrealistic assumptions, what position the employee would have been in had the employer performed its obligation. That will involve the court in assessing the employee's bonus, on the basis of the evidence before it, and thus to that extent putting itself in the position of the employer...”

The correct approach ought not be excessively conservative or generous. It must, of course, depend on the particular facts and context of the case, and this particular employer/employee relationship.

Burton J at [82] explained how he would put the Claimant in the position that he would have been in had the Defendant complied with its obligations.

My finding on the assurances

137. I have set out above the evidence that was given by all witness in this regard. I remind myself of how the Claimant puts her case in respect of the assurances (the gist) in her pleaded case and her written and oral evidence. I find the evidence in support of the Claimant's case to be unclear, nebulous and also inconsistent (both internally and between the different witnesses). I accept the Claimant's position that I am not to measure these assurances in line with a test for “Reasonable Expectations” in terms of certainty and clarity. The Claimant does not put the case that there were guarantees. If so, they would have had to be in writing. The Claimant's case is that the assurances, in the context they were given, ought to have taken into account.
138. However, I accept the Defendant's case that, although certain aspirations and hopes may have been expressed, there was nothing said or done which could amount to an assurance. In any event, an assurance of what? Whilst the Claimant contends that the precise form of the assurances does not matter, in my judgment the alleged assurances need to have been given in such a way that it could be expected that someone would place a degree of reliance upon them.

139. The Claimant's own evidence lacks clarity as to what she says she was told and by whom. I do not accept that she was given any direct assurances by Dr Sprenger. Her recollection as to anything said or done by him upon which she could rely came about rather late in the day. Failure to raise these assertions in any contemporaneous documentation troubles me, particularly when the Claimant was given ample opportunity to do so in her grievance procedure. Her reliance on what was said by Mr Namagiri has to be considered again against the contemporaneous telephone transcripts. As stated, Mr Namagiri was, in my judgment, carefully expressing hope and aspiration. To read any more into those conversations (which the Claimant herself says are reflective generally of what she was told) is to strain credulity. Mr Spaulding's evidence, whilst more supportive of the Claimant's case, ultimately expressed no more than general expectations based on past history rather than reliable assurances of future remuneration.
140. Whilst I do not doubt that the Claimant now believes that she was made clear assurances, the clarity of her belief has to be seen through the prism of hindsight. Any objective analysis of what she was she was told would not lead to the conclusions that certain expectation had been engendered. I do not accept that, subjectively, that is what the Claimant could genuinely have believed at the time. Had she so believed, why constantly ask for reassurance as to her future? Why repeatedly ask for things to be put in writing? These requests do not support the assertion that the Defendant, by its words or conduct, had engendered certain expectation in the Claimant.
141. Is the Claimant's evidence bolstered by the evidence of others? I conclude it is not. Mr Spaulding (the Defendant's witness) is the most helpful to the Claimant's case. Despite the Claimant's submissions that he supports the Claimant's case, in my judgment his evidence taken as whole does no more than support the general belief within the NCOU team that, in the absence of being told otherwise, they would get a bonus. The fact that people were "deeply, deeply upset" when this proved not to be the position, I am sure is accurate. However, as Mr Spaulding said, that was disappointment because their expectation was wrong and it was not right to look at this all in a vacuum when it was clear that the Bank was struggling with, for example, its share price.
142. I have referred to my assessment of Dr Sprenger's evidence extensively above. I find that he did not make any relevant assurances to the Claimant which would have engendered expectations. I find that, not only on the basis of what he said about not making any, but more pertinently because he knew that his plan as to remuneration had never been accepted by the Bank. The document trail, which I accept as consistent with the Defendant's

case (even if Dr Sprenger struggled to recall it) leads me to the conclusion that the Bank never accepted a plan for additional remuneration to the members of the NCOU team over and above the 2015 off-cycle award letter. There was never an agreement that there would be bonus in “multiples” or in line with previous years or more, or that there would in fact be a bonus pool for IVC at all for the NCOU. Dr Sprenger clearly had financial aspirations for himself and his department. There is nothing to support his alleged belief that they were to be met by the Bank. The proposals he made for an incentive plan varied strikingly over this time period, undermining his position that there was a high level of agreement. Dr Sprenger was being “cold-shouldered” by Mr Cryan in late 2016 and there was clearly no express agreement between them when there was a discussion on 30th October 2016 (that focussed on the position of the NCOU senior management, not completion bonuses). The line of communication between Ms Lambert and Dr Sprenger late 2016/early 2017 demonstrates that Dr Sprenger must have known that there had been no such promise or agreement. I make no observation as to Mr Cryan’s observation as to Dr Sprenger’s character and motivation. Nevertheless, it is clear that Mr Cryan disagreed strongly with Dr Sprenger’s asserted position. It is of note that Dr Sprenger has not been able to refer to a single piece of documentation which would support his position. All of the documents point the other way. I do not accept Dr Sprenger’s assertion that he believed there was such an agreement.

143. Mr Namagiri’s evidence does not assist the Claimant’s case either. As stated above, the most that can be said is that he encouraged the Claimant not to leave but made her no promises as to future roles or compensation. In his evidence to the grievance interview and his oral evidence to the court he was clear that he would not have used any language that involved an express assurance. Again, there may have been a general assumption that things would work out positively, based on past experience, but the contemporaneous evidence of Mr Namagiri does not support a finding that he made assurances which could have engendered any expectation. Telling someone not to worry is very different from promising or assuring someone that a particular outcome will be achieved.
144. In summary, I am not satisfied, on balance that the Claimant received assurances from the Defendant as alleged or at all. She may have received aspirational comments that she would be looked after and treated fairly but no more.
145. Even had I been satisfied, on balance, that assurances had been provided, what were they assurances of? The Claimant’s case is, as stated, nebulous. The Claimant’s specific assertion that Mr Spaulding asserted that key NCOU contributors would receive multiples of previous years bonus is directly denied by Mr Spaulding. I accept Mr Spaulding’s (largely

unchallenged) evidence on this issue. The Claimant could not provide any further details of the assurances when requested by Further and Better Particulars and her written and oral evidence did not improve the position.

146. Part of the Claimant's case is that bonus payments/ variable compensation had been paid in every year and that this, combined with what was said, engendered an expectation. Nevertheless, in public documents, available to the Claimant as well as the world at large, it was made clear that the Bank's bonus pool had significantly reduced. The fact that there was a pool was self-evident as stated in those documents. The Claimant's assertion that such compensation came from "the Bank" has to be considered against the publicly available information that the Bank published. The generality and vagueness of her alleged "assurances" have to be considered in the light of the Bank's known difficult financial situation.
147. Further, the Bank's ability to make bonus payments has to be considered against its regulatory framework. There was a limit of what bonuses could be paid, compared to salary. This was a matter of public record. Whilst individual cases could be made against that, it would be subject to authorisation. The Claimant appeared either to have ignored that, in her assertion as to assurances, or have decided that she would be placed into an exceptional category. Much was made in submission as to this being a case for one claimant only, not a class action. As such, it is said, questions as to the Claimant's compensation have to be considered solely in respect of her, ignoring wider questions of other employees' positions. Whilst it is correct that this court is determining a claim for one claimant only, the Bank's position at the time the bonus decision (and any relevant assurances) was made, was different. The Claimant was not the only person in her situation in the NCOU. It is clear that a number of other employees were similarly affected by the decision to award zero IVC (notably Mr Spaulding, Mr Namagiri and Dr Sprenger). Across the Bank, in other departments, many other senior managers received a zero IVC. Had any assurances been made to the Claimant they must equally have applied to others, at least those in the NCOU who were in the "unique" position of working themselves out of a job. As such, approval for additional IVC's would not just relate to the Claimant, but to many. This context makes it unlikely that the Bank would have given the alleged assurances.
148. Of further note was the "off-cycle" letter to the Claimant and others in the NCOU in late 2015. In my judgment the Bank recognised the retention issue within the NCOU: if they were working themselves out of a job, there was a risk that people would leave prematurely, and the job would not be completed. The incentive proposal by Dr Sprenger put to Mr Krause,

was rejected, it was said to be unworkable and potentially unlawful. As such, the evidence (from Ms Lambert, supported by documents but hardly recalled by Dr Sprenger) is that Plan B was formulated. This came from the NCOU itself to deal with the retention issue. The Claimant and others were offered significant increases in salary (£90,000 pa, backdated a year in the Claimant's case) and significant off-cycle payments, vesting in 3 tranches in the future, to secure staff retention. The Claimant contended that this was not seen by her as sufficient. However, the Bank's position was that this package was to answer the problem of the NCOU accelerated closure. It is against that background that I have looked at the Claimant's case as to assurances. It is not simply that the recollection of witnesses is poor and the inconsistencies plain. It is also that the likelihood of such assurances having been provided is extremely weak, in the context of the off-cycle award offer.

149. Finally, there is an absence of any documentation to support the Claimant's position that the Bank made assurances. All of the written documentation supports the Bank's case that there was never any agreement that additional VCs would be paid to the NCOU or the Claimant. Against this background, any assurances given would have been made without anything from the Bank to support them. I conclude that this makes it extremely unlikely that Mr Namagiri, Dr Sprenger or Mr Spaulding would have made assurances to the Claimant as she alleges. There would be no basis for them doing so.
150. I place some little weight on the Reference Total Compensation document: it indicates an orientation figure but does not bind the Bank to the level of IVCs in fact payable,
151. For these reasons I find the Claimant has not proved that the assurances she alleges were in fact given.

Are any assurances relevant?

152. Even had assurances been provided, I would then need to consider whether they would have been relevant matters which the Bank ought to have considered in reaching its compensation decision. The Claimant contends that the starting point is the contractual documents which list that, in considering an annual Discretionary Incentive Award this will be based on a number of factors "*including but not limited to (in no particular order of importance) the performance of the Company generally, the specific contribution of its component business units, your individual personal contribution and the need to retain you in employment within the Company...Further For the avoidance of doubt, you do not have a contractual entitlement to receive a Discretionary Incentive Award and any such award in a given year will be at the absolute discretion of the Company.*" The Claimant contends that it

is important to distinguish performance from affordability: performance being a general expression which is apt to refer to a very large number of factors regarding the company and its long-term sustainability. However, I note Ms Lambert and Mr Peel's evidence as to how the Bank considered affordability and in fact performance factors over all were considered. In making that assessment. I do not accept that absence of the word "affordability" in the contract means that it is not a factor to be considered. Performance of the company can be read to include affordability.

153. The Employees Handbook expressly states: *"For the avoidance of doubt, any discretion exercised by the Company to award any Discretionary Variable Compensation to you based on Group VC shall not be based on any single criterion such as past performance of the Bank or the relevant business division, but on a range of criteria that may vary from year to year as the Management Board in its sole discretion considers reasonable. The Company reserves the right to amend, modify or remove the various components of Discretionary Variable Compensation awards set out above for eligible employees from time to time."* The Claimant's position is that the Bank cannot simply pick one item, performance (or affordability) and exclude consideration of all others. The other matters must be of relevance it says. The Claimant asserts that this is the proper reading of the contract.
154. In my judgment, this only takes the Claimant so far. I accept that the "Policy" documents are not expressly incorporated into the contract, but they assist the employer and employee in understanding how the discretion would properly be exercised. They are important documents in the contractual playing field. The documents taken as a whole make it abundantly clear that all VC payments are discretionary. Further, I read the reference to the company's performance in the contract to make a central element whether the company could afford to pay IVCs.
155. The Claimant places reliance on Ms Lambert's apparent acceptance that all matters should be considered out of a sense of fairness (there is reference to "Just a matter of sequencing" suggesting that more than one factor should be considered). Of course, whether Ms Lambert agrees that all matters are relevant is of interest but not binding on this court. Concessions she may (or may not) have made in cross-examination as to considering individual circumstances and overall fairness are noted. However, it is a matter of law for me to determine whether a factor ought to have been considered. Further, I am not satisfied in fact that this is what Ms Lambert was saying. She said that the decision-maker would make the decision in the round, but she expressly stated that the affordability of the Bank had to take priority. She was not swayed on that ultimate issue.

156. The Claimant asserts that the assurances are clearly relevant factors because an employee may make arrangements on that basis. In the Claimant's case, the high point of her evidence was that she did not apply for other jobs (although I note in the transcripts of the calls with Mr Namagiri, she was told it might be a good idea to see what was out there and update her resume). Although in principle this might be a valid argument, in this context it is not an arguable factor. Any alleged assurances have to be considered in context. What were the assurances? How clear or certain were they to be delivered (I do not mean in the strict legal sense of "Reasonable Expectation"). To be relied upon they must have engendered some expectation: here context is everything. The alleged assurances were said to be made against a background of known financial insecurity in the Bank. Would a reasonable employee commit say to an investment or a loan on the basis of "expecting to be treated fairly" or other imprecise "assurances" when it was known that the Bank was facing financial pressures? In my judgment it cannot be argued, on the facts of this case, that any reliance would be expected upon any such uncertain assurances.
157. The Claimant relies on the issue of fairness; if an assurance is given it is only fair to keep to the promise. Again, context is everything. If, as in some of the authorities referred to, explicit promises are made in an open meeting, one can understand that the offeror ought not be able, all things being equal, to renege on the bargain. But in this case, it is of note that fairness has to be considered more widely. Fair to whom? This was a work-place wide decision, not a personal one only for the Claimant. If bonuses were to be paid as per the alleged assurance, the Claimant would be treated differently from other employees. Why is that fair? Because she through persistence extracted an assurance? Should she be in a better position than other NCOU employees who had not been so persistent? Or others within the Bank whose position was the same? If payment of IVC was instead applied more widely and that threatened the financial security of the Bank as Mr Peel and Ms Lambert explained, is that fair to other employees who could potentially face the prospect of no salaries, let alone no bonus? I do not consider that the principle of fairness, in the context of this case, assists the Claimant's position.
158. Further, although clearly there is an implied contractual term of trust and confidence, I do not accept that in the present context it adds anything. It is said there was an abuse of trust, relying heavily on Mr Spaulding's analogy of grief: but proper analysis of what his evidence leads me to conclude that he was saying that individuals felt let down (even betrayed) not because of what they had been told, but because they had allowed themselves to believe they would receive bonuses despite no positive affirmation of that. I note that he also felt

that the manner of communications should be better. Although an employee can expect there to be a relationship of trust and confidence, in the circumstances of this case there was, I find no breach of such an implied term.

159. It is argued that it would have been entirely possible for the Defendant to have regard to assurances provided to individuals. In my judgment that is a naïve assertion. In an organisation the size of the Defendant this would be unduly onerous. It would be impractical to expect the Bank to rely on “coffee shop promises” i.e. a conversation made in an imprecise informal way. This would lead to constant battles and investigations which would impose an unreasonable burden on both the employer and employee in terms of investigation, challenge and proof. To avoid such a situation the Bank has a system in place: guarantees must be in writing. That is a reasonable position for the Bank to take, it is known and accepted by both sides and provided clarity and certainty.
160. None of the factors put forward by the Claimant (all of which I have considered in the round) persuade me that the assurance alleged by the Claimant, or the “special” position of the NCOU and its/her performance, are such that they have to be considered by the Defendant in exercising its discretion. I do not consider it necessary in the context of the present decision, particularly noting the Bank’s concerns as to its viability, for these matters to be taken into account.
161. What is the context that leads me to this conclusion? The Defendant contends that it was not affordable to make VC payments to the Claimant and others of her seniority and above across the Bank. The decision-making process, as set out in the evidence of Ms Lambert and Mr Peel was not challenged. It was, in my judgment, careful, detailed and prolonged. Other options were considered and rejected. The Bank had to make a decision to protect its future viability which was also in compliance with the regulatory framework.
162. The Defendant’s case is that the VC came from a VC pool. There is no alternative method for regulating the pattern of VC payment that has been presented and the unchallenged evidence is that this is common practice. It is not disputed that affordability is capable of being a relevant consideration for the Bank in setting the VC pool (and hence the IVC payment). However, the question is whether it is a factor which could trump all others i.e. if the Bank determined that VCs are not affordable (and set a small or zero VC pool reflecting this) this means that the Bank is entitled to disregard all other factors.
163. In my judgment, the Bank is entitled to work out what is affordable as a first step. The Bank is a commercial enterprise, a for-profit organisation run for the benefit of its shareholders. That does not mean that it is not bound by contract to be fair to its employees; I recognise

that imbalance of power in the relationship between employer and employee. I accept that financial remuneration is at the heart of that relationship. However, if a commercial organisation determines, having properly considered the position, that payment of a discretionary element of the remuneration is not affordable, that is a decision it is entitled to take. The Bank could not legally say: "We cannot afford to pay your salary so you will not be paid". There is no discretion to be exercised on that issue. But in the commercial environment when exercising its contractual discretion, it must be entitled to treat affordability as a primary consideration.

164. The evidence is clear and undisputed that the Bank had to act in an environment of significant regulatory scrutiny following the financial crisis of 2008. The CRD IV directive placed various controls on banks' approach to the payment of bonuses. These included the introduction of VC ratios and the requirement that "any proposal to award VC had to be demonstrably affordable" (Ms Lambert's statement). The history of the Bank's planning for the 2016 VC pool is well set out in the unchallenged evidence.
165. The Claimant contends that there is no evidence that the Claimant's individual compensation was not affordable; and it is of course only the Claimant's case with which the court is concerned. However, I do not accept that I can consider the Claimant's position in a vacuum. She was in the same position as many other individuals in the NCOU (who she says had relied on similar assurances. and worked themselves out of a job). As a matter of fairness (and probably contract law generally) the decision of the Defendant to treat all employees at a certain level of seniority the same is a reasonable and rational one. Although the Claimant appeared to assert that she was in a unique position, I do not accept that the evidence established this. She was a "star" performer in the NCOU but that did not mean that there were not others who were in the same contractual and performance position. It is likely on balance that over 100 others in the NCOU would have been in a similar situation. Further, 100,000 employees overall may have been seeking IVC based on personal or other factors.
166. As expressed in the Compensation Authorisation Policy as "*the overriding consideration is balancing Group affordability against competitiveness*" The Claimant contends that even in these circumstances, payment to the Claimant could have been paid out of the Bank's reserves. Nevertheless, the evidence from Ms Lambert was that this was subject to regulatory approval and there was a real need to preserve the Bank's reserves to ensure financial viability. I accept that (undisputed) evidence.

167. I do not accept that the Bank's application of the affordability criterion has been overstated or that there is a paucity of evidence on this issue. Mr Peel's unchallenged evidence dealt with this issue comprehensively (see the evidence above). This was a matter very carefully considered, balanced against the issue of talent retention. The fact that in previous years, when the Bank had financial difficulty, bonuses were still paid, does not mean that this had to be the position into the future. To continue making unaffordable bonuses would inevitably lead to real difficulties and potentially financial collapse. Ms Lambert confirmed the Bank's precarious financial position in her evidence and the need to preserve the Bank's financial reserves. Further, Ms Lambert's evidence was supported by significant documentation explaining (and justifying) both the decision and the decision-making process. I am satisfied that the evidence establishes that affordability was of paramount importance.
168. In summary, I conclude that even had reliable assurances been given, the Bank was entitled to determining that affordability was the paramount consideration in determining whether to make VC that year. The Defendant was entitled to so conclude because, as a commercial organisation operating in a tightly regulated environment, the payment of bonuses threatened the financial viability of the Bank. This was an entirely rational decision. It acted properly as a factor which excluded consideration of the factors.
169. As such I conclude that the decision made by the Defendant as to which factors to consider and which to exclude in determining the payment of the discretionary IVC It was not, in those circumstances, a void decision or **Wednesbury** Limb 1 unreasonable.
170. Was the decision itself irrational? (**Wednesbury** Limb 2). It is contended that the compensation decision was irrational/perverse partly because the Defendant did not take into account relevant considerations. As set out above, I reject that case. Further it is argued that circumstances where the Claimant's performance was (on any view) exceptional having regard to the particular circumstances of the NCOU, it was irrational for the Defendant not to honour the express or implied bargain that she would be paid for the job done and her achievement of the targets set.
171. I do not accept that the Claimant has established that her performance, in the particular circumstances of the accelerated closure of the NCOU was unique and exceptional. That is not to say that she was not a "star" performer. How many stars there were in that particular sky I know not. I do know that others (Mr Namagiri, Mr Spaulding included) were it seems also well respected and working toward the same end. I cannot say that there was any illogicality as to the decision, which applied to all managers her legal and above. The

Claimant was provided no special treatment, negatively or positively. In the context explained above this was a reasonable decision.

172. The Claimant further contends that the compensation decision was unlawful for failure to provide reasons, and thereby in breach of the implied term of mutual trust and confidence: I do not accept that there is any merit in this argument. The Defendant provided reasoning on various company-wide communications. The Claimant fell into the category of those not receiving a discretionary VC. She did receive the Group VC. The rationale was provided and explained on the intranet. She had sufficient information as to the Bank's decision-making process. It cannot be said that this was irrational decision making.

Damages

173. For the reasons set out above I do not need to move on to the assessment of any damages in this case. The Claimant has not proved her case. However, if my decision had been different and I had determined (i) relevant assurances had been provided and (ii) they ought to have been considered a relevant factor, I would have put myself into the shoes of the decision-maker and considered all relevant factors. Although the evidence before me on this issue is perhaps not the clearest, I would have given significant weight to the question of affordability. I am persuaded that this would have been a factor which would have outweighed question of individual assurances and performance. I would therefore have concluded that no IVC would have been payable in any event.

Conclusion

174. For the reasons set out above the Claimant's case fails. I do not accept that assurances were provided to her as she alleged upon which she could realistically either objectively or subjectively have any expectation. Even had there been I am satisfied that the Bank was entitled to consider that the payment of IVC to the Claimant (and many others of her seniority and above) was unaffordable. This was a factor which was paramount. The Defendant did not need to consider other personal assurances, circumstances, or performance in those circumstances. The Defendant is not in breach of its contract, nor was its exercise of its discretionary decision-making power unreasonable or irrational.

HHJ Howells

Sitting as a Judge of the High Court

12th July 2024